

8-21-2012

# In Re Beyer Clerk's Record v. 1 Dckt. 39886

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**LAW CLERK**

Vol 1 5

In the  
**SUPREME COURT**  
of the  
**LAW CLERK** **STATE OF IDAHO**

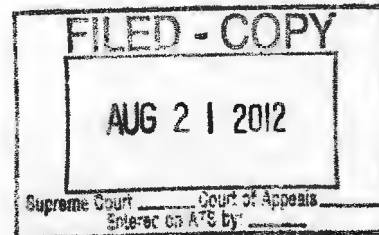
GEORGE JAY BEYER, JR.,

Petitioner-Appellant,

v.

STATE OF IDAHO -DEPARTMENT  
OF TRANSPORTATION,

Respondent.



**CLERK'S RECORD ON APPEAL**  
**VOLUME I**

Appealed from the District Court of the  
Second Judicial District of the State of Idaho,  
in and for the County of Nez Perce

The Honorable JEFF M. BRUDIE  
SC #29886  
Supreme Court No. 39886

EDWIN LITTENER  
ATTORNEY FOR RESPONDENT

CHARLES STROSCHIN  
ATTORNEY FOR PETITIONER APPELLANT

39886

IN THE SUPREME COURT OF THE STATE OF IDAHO

GEORGE JAY BEYER, JR.,	)	
	)	
Petitioner-Appellant,	)	
	)	
	)	SUPREME COURT NO. 39886
	)	
v.	)	INDEX
	)	
STATE OF IDAHO, DEPARTMENT	)	
OF TRANSPORTATION,	)	
	)	
Respondent.	)	

CLERK'S RECORD

Appeal from the District Court of the Second Judicial District  
of the State of Idaho, in and for the County of Nez Perce

BEFORE THE HONORABLE JEFF M. BRUDIE, DISTRICT JUDGE

Counsel for Appellant

Mr. Charles M. Stroschein  
P O Drawer 285  
Lewiston, ID 83501

Counsel for Respondent

Mr. Edwin L. Litteneker  
P O Box 321  
Lewiston, ID 83501

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

GEORGE JAY BEYER, JR.,	)	
	)	
Petitioner-Appellant,	)	
	)	
	)	SUPREME COURT NO. 39886
	)	
v.	)	TABLE OF CONTENTS
	)	
STATE OF IDAHO, DEPARTMENT	)	
OF TRANSPORTATION,	)	
	)	
Respondent.	)	

	<u>Page</u>
Register of Actions.....	1-4
Petition for Judicial Review filed December 27, 2010.....	5-20
Exparte Motion for Stay on Pending Judicial Review filed December 27, 2010.....	1-23
Exparte Order for Stay on Pending Judicial Review filed December 27, 2010.....	24-25
Notice of Lodging of Agency Record filed January 10, 2011.....	26-29
Response to Notice of Lodging of Agency Record filed January 18, 2011.....	30-32
Notice of Filing Agency Record filed January 24, 2011.....	33-34
Agency Record filed January 24, 2011.....	35-228



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

GEORGE JAY BEYER, JR.,	)	
	)	
Petitioner-Appellant,	)	
	)	
	)	SUPREME COURT NO. 39886
	)	
v.	)	INDEX
	)	
STATE OF IDAHO, DEPARTMENT	)	
OF TRANSPORTATION,	)	
	)	
Respondent.	)	

	<u>Page</u>
Agency Record filed January 24, 2011.....	35-228
Exparte Motion for Stay on Pending Judicial Review filed December 27, 2010.....	1-23
Exparte Order for Stay on Pending Judicial review filed December 27, 2010.....	24-25
Notice of Filing Agency Record filed January 10, 2011.....	33-34
Notice of Lodging of Agency Record filed January 10, 2011.....	26-19
Petition for Judicial Review filed December 27, 2010.....	5-20

Date: 6/21/2012

Sec Judicial District Court - Nez Perce Co

User: DEANNA

Time: 12:52 PM

ROA Report

Page 1 of 4

Case: CV-2010-0002748 Current Judge: Jeff M. Brudie

In The Matter Of George Jay Beyer Jr

In The Matter Of George Jay Beyer Jr

Date	Code	User	Judge
12/27/2010	NCOC	DIANE	New Case Filed-Other Claims Jeff M. Brudie
		DIANE	Filing: L3 - Appeal or petition for judicial review or cross appeal or cross-petition from commission, board, or body to district court Paid by: Clark & Feeney Receipt number: 0022477 Dated: 12/27/2010 Amount: \$88.00 (Check) For: Beyer, George Jay Jr (subject) Jeff M. Brudie
	ATTR	DIANE	Subject: Beyer, George Jay Jr Attorney Retained Charles M Stroschein Jeff M. Brudie
	PETN	DIANE	Petition for Judicial Review Jeff M. Brudie
	MOTN	DIANE	Ex Parte Motion for Stay on Pending Judicial Review Jeff M. Brudie
	ORDR	DIANE	Ex Parte Order for Stay on Pending Judicial Review Jeff M. Brudie
1/10/2011	NOTC	PAM	Notice of Lodging of Agency Record Jeff M. Brudie
1/12/2011	NOAP	PAM	Notice Of Appearance Jeff M. Brudie
	ATTR	PAM	Other party: State of Idaho Department of Transportation Attorney Retained Edwin L Litteneker Jeff M. Brudie
	MISC	PAM	Request for Scheduling Conference -- State of Idaho Dept of Transportation Jeff M. Brudie
	NOTC	PAM	Notice of Estimate of Transcript Cost Jeff M. Brudie
1/18/2011	MISC	PAM	Response to Notice of Lodging of Agency Record -- Petitioner Jeff M. Brudie
1/24/2011	NOTC	PAM	Notice of Filing Agency Record Jeff M. Brudie
	MISC	PAM	Agency Record Jeff M. Brudie
1/25/2011	MISC	PAM	ITD's Reply to Response to Notice of Lodging of Agency Record Jeff M. Brudie
	MISC	PAM	Objection to Agency Record -- Petitioner Jeff M. Brudie
	MISC	PAM	Objection Re Settlement of Record -- Petitioner Jeff M. Brudie
1/27/2011	MISC	PAM	Response to ITD's Reply to Response to Notice of Lodging of Agency Record Jeff M. Brudie
3/29/2011	MISC	PAM	Request for Scheduling Conference -- Dept of Transportation Jeff M. Brudie
4/4/2011	HRSC	JANET	Hearing Scheduled (Telephonic Scheduling Conference 04/27/2011 02:45 PM) Jeff M. Brudie
		JANET	Notice Of Hearing Jeff M. Brudie
4/27/2011	HRHD	PAM	Hearing result for Telephonic Scheduling Conference held on 04/27/2011 02:45 PM: Hearing Held Jeff M. Brudie
4/28/2011	NTHR	PAM	Notice Of Hearing -- 5-12-10 @ 10:00am Petitioner's Objection to Agency Record Jeff M. Brudie
	HRSC	PAM	Hearing Scheduled (Hearing 05/12/2011 10:00 AM) Petitioner's Objection to Agency Record Jeff M. Brudie

REGISTER OF ACTION

In The Matter Of George Jay Beyer Jr

Date	Code	User	Judge
5/12/2011	HRHD	PAM	Hearing result for Hearing held on 05/12/2011 10:00 AM: Hearing Held Petitioner's Objection to Agency Record
	DCHH	PAM	District Court Hearing Held Court Reporter: Linda Carlton Number of Transcript Pages for this hearing estimated: Less than 100 pages
5/17/2011	MOTN	PAM	Motion Regarding Judicial Notice -- Petitioner
	NTHR	PAM	Notice Of Hearing -- 5-26-11 @ 10:00am Petitioner's Motion Regarding Judicial Notice
	HRSC	PAM	Hearing Scheduled (Hearing 05/26/2011 10:00 AM) Petitioner's Motion Regarding Judicial Notice
5/25/2011	MISC	PAM	Response to Motion Regarding Judicial Notice --Respondent
5/26/2011	MINE	PAM	Minute Entry Hearing type: Appellate Argument Hearing date: 5/26/2011 Time: 11:38 am Courtroom: Court reporter: Minutes Clerk: PAM Tape Number:
	HRHD	PAM	Hearing result for Hearing held on 05/26/2011 10:00 AM: Hearing Held Petitioner's Motion Regarding Judicial Notice
	DCHH	PAM	Hearing result for Hearing held on 05/26/2011 10:00 AM: District Court Hearing Held Court Reporter: Linda Carlton Number of Transcript Pages for this hearing estimated: Less than 100 pages Petitioner's Motion Regarding Judicial Notice
6/1/2011	NOTC	PAM	Notice of Filing Transcript
	TRAN	PAM	Transcript Filed
6/15/2011	MOTN	PAM	Motion to Determine ITD's Responsibilities Under Rule 84
	MISC	PAM	Objection to Petition for Judicial Review
6/27/2011	MISC	PAM	Response to Objection to Petition for Judicial Review
7/11/2011	ORDR	PAM	Order Regarding Judicial Notice
	MISC	PAM	**Once Hearing Officer Supplements Record, and if there are no other objections to the record, the Court will schedule the matter for briefing and argument on Petition for Judicial Review**
8/16/2011	MISC	JANET	Judicial Notice Documents Per Remand Order From the Court
	MISC	JANET	Response to Order Regarding Judicial Notice

## In The Matter Of George Jay Beyer Jr

Date	Code	User	Judge
9/16/2011	MISC	PAM	Request for Scheduling Conference Respondent Idaho Transportation Department Jeff M. Brudie
9/23/2011	HRSC	PAM	Hearing Scheduled (Telephonic Scheduling Conference 10/05/2011 02:15 PM) Jeff M. Brudie
		PAM	Notice Of Hearing -- 10-5-11 @ 2:15pm Telephonic Scheduling Conference Jeff M. Brudie
10/5/2011	MISC	PAM	**Jennifer at Mr. Stroschein's Office Called -- Mr. Stroschein is Unavailable for Telephone Scheduling Conference -- Need to Re-set** Jeff M. Brudie
	HRVC	PAM	Hearing result for Telephonic Scheduling Conference scheduled on 10/05/2011 02:15 PM: Hearing Vacated Jeff M. Brudie
11/3/2011	HRSC	PAM	Hearing Scheduled (Telephonic Scheduling Conference 11/16/2011 03:45 PM) Jeff M. Brudie
		PAM	Notice Of Telephonic Scheduling Conference 11-16-11 @ 3:45pm Jeff M. Brudie
11/16/2011	HRHD	PAM	Hearing result for Telephonic Scheduling Conference scheduled on 11/16/2011 03:45 PM: Hearing Held Jeff M. Brudie
11/17/2011	ORDR	PAM	Order Scheduling Briefs & Argument Jeff M. Brudie
	HRSC	PAM	Hearing Scheduled (Appellate Argument 03/01/2012 09:00 AM) Jeff M. Brudie
1/13/2012	MEMO	PAM	Memorandum in Support of Petition for Judicial Review - ALS Jeff M. Brudie
2/6/2012	BRFD	PAM	Brief of the Idaho Transportation Department Jeff M. Brudie
2/9/2012	MOTN	PAM	Motion to Move Hearing -- (Appellate Argument from 3-1-12 @ 9:00am to 3-8-12 @ 9:00am) Jeff M. Brudie
2/10/2012	BRFD	PAM	Reply Brief Filed Jeff M. Brudie
2/14/2012	CONT	PAM	Continued (Appellate Argument 03/08/2012 09:00 AM) Jeff M. Brudie
		PAM	Amended Notice Of Hearing -- 3-8-12 @ 9:00am -- Appellate Argument Jeff M. Brudie
3/8/2012	MINE	PAM	Minute Entry Hearing type: Appellate Argument Hearing date: 3/8/2012 Time: 9:03 am Courtroom: Court reporter: Linda Carlton Minutes Clerk: PAM Tape Number: Crtrm 1 Petitioner: Charles M. Stroschein Jeff M. Brudie
			Respondent: Edwin L. Litteneker
	HRHD	PAM	Hearing result for Appellate Argument scheduled on 03/08/2012 09:00 AM: Hearing Held Jeff M. Brudie

In The Matter Of George Jay Beyer Jr

Date	Code	User	Judge
3/8/2012	DCHH	PAM	Hearing result for Appellate Argument scheduled on 03/08/2012 09:00 AM: District Court Hearing Held Court Reporter: Linda Carlton Number of Transcript Pages for this hearing estimated: Less than 100 pages
4/3/2012	MISC	PAM	Supplemental Authority -- Petitioner
4/9/2012	MEMO	PAM	Memorandum Opinion & Order on Petition for Judicial Review
	MISC	PAM	**The Order of the Hearing Officer Sustaining Petitioner Beyer's driver's license suspension is Affirmed**
	MISC	PAM	**The Order of the Court staying imposition of the suspension is Lifted** The period of suspension ordered by the Department of Transportation shall begin 4-20-12 and run for the length of time ordered pursuant to statute**
	CDIS	PAM	Civil Disposition entered for: State of Idaho Department of Transportation, Other Party; Beyer, George Jay Jr, Subject. Filing date: 4/9/2012
	STAT	PAM	Case Status Changed: Closed
4/19/2012		DIANE	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Clark and Feeney Receipt number: 0006856 Dated: 4/19/2012 Amount: \$101.00 (Check) For: Beyer, George Jay Jr (subject)
	ORDR	PAM	Ex Parte Order for Stay Pending Appeal
	APSC	DEANNA	Appealed To The Supreme Court
	MOTN	DEANNA	Ex Parte Motion for Stay Pending Appeal
	NTAP	DEANNA	Notice Of Appeal
	BNDC	DEANNA	Bond Posted - Cash (Receipt 6888 Dated 4/19/2012 for 100.00)
	BONC	DEANNA	Condition of Bond Clerk's Record
	BNDC	DEANNA	Bond Posted - Cash (Receipt 6889 Dated 4/19/2012 for 244.00)
	BONC	DEANNA	Condition of Bond Reporter's Transcript
5/15/2012	BNDO	DEANNA	Bond Converted to Other Party (Transaction number 710 dated 5/15/2012 amount 240.50)
6/19/2012	SCRT	DEANNA	Supreme Court Receipt - Notice of Appeal filed at the SC, Record and Transcript due by June 29, 2012

FILED

2010 DEC 27 PM 3 17

PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
*[Signature]*  
DEPUTY

CHARLES M. STROSCHEIN  
CLARK and FEENEY  
Attorneys for Respondent  
The Train Station, Suite 201  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208)743-9516

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of the	)	Case No. <b>CV10-02748</b>
Driving Privileges of	)	IDT File No. 648000035832
	)	Idaho D. L. No. JA363481B
	)	
	)	PETITION FOR JUDICIAL REVIEW
GEORGE JAY BEYER, JR,	)	
	)	
Respondent.	)	
_____	)	

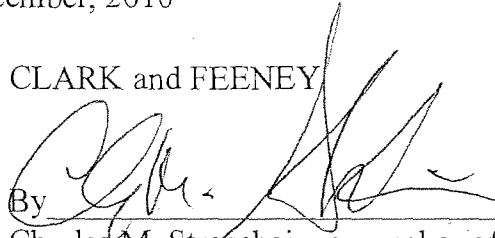
COMES NOW, GEORGE JAY BEYER, JR., the Respondent in the above-entitled matter by and through his undersigned Attorney of Record, CHARLES M. STROSCHEIN, of the firm of Clark & Feeney, and pursuant to Idaho Code Sections 18-8002A(8) and 67-5270 et seq. hereby respectfully petitions this Court for Judicial Review of the Findings of Fact and Conclusions of Law and Order entered by the Idaho Department of Transportation on December 23, 2010, in file number 648000035832. A copy of said final Order is attached

Petition for Judicial Review 1

hereto as Exhibit "A". Said proceeding and final Order were entered following a hearing  
held pursuant to Idaho Code Section 18-8002A.

DATED this 21 day of December, 2010

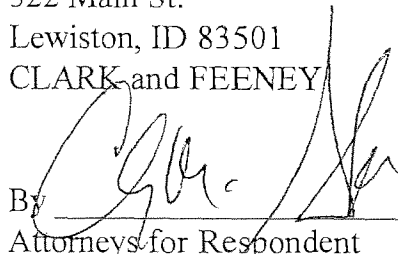
CLARK and FEENEY

By   
Charles M. Stroschein, a member of the firm.  
Attorneys for Respondent.

I hereby certify on the 21  
day of December, 2010, a true copy  
of the foregoing instrument  
was: ☒ Mailed  
☒ Faxed  
☐ Hand delivered  
☐ Overnight mail to:

IDAHO TRANSPORTATION DEPARTMENT  
DRIVER SERVICES SECTION  
P O BOX 7129  
BOISE ID 83707

Edwin L. Litteneker  
Attorney at Law  
PO Box 321  
322 Main St.  
Lewiston, ID 83501  
CLARK and FEENEY

By   
Attorneys for Respondent

# EXHIBIT A

PETITION FOR JUDICIAL REVIEW



IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

RECEIVED

DEC 23 2010

CHARLES M. STROSCHIN  
ATTORNEY  
208-743-9516

IN THE MATTER OF THE	)	IDAHO D.L. No. JA363481B
DRIVING PRIVILEGES OF	)	FILE No. 648000035832
	)	
	)	<b>FINDINGS OF FACT AND</b>
<b>GEORGE JACOB BEYER JR.</b>	)	<b>CONCLUSIONS OF LAW AND</b>
	)	<b>ORDER</b>
_____	)	

This matter came on for Administrative License Suspension (ALS) hearing on December 01, 2010, by telephone conference. Charles Stroschein, Attorney at Law, represented Beyer.

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A\* is **SUSTAINED**.

**EXHIBIT LIST<sup>†</sup>**

The hearing examiner received the following exhibits into evidence as part of the record of the proceeding:

1. Notice of suspension and temporary permit
2. Evidentiary test results
3. Instrument operations log
4. Sworn statement
5. Influence report
6. Copy of citation number 35832
7. Copy of petitioner's driver's license
8. Envelope from law enforcement agency

9. Certificate of receipt of law enforcement documents
10. Petitioner's hearing request
11. Petitioner's request for subpoenas
12. Petitioner's notice of appearance
13. Petitioner's motion for discovery order
14. Petitioner's driving record
15. Subpoena-civil
16. Subpoena-duces tecum
17. Subpoena-duces tecum
18. Order
19. Order
20. Order

- A. Portable breath testing instrument inspection/certification
- B. DVD
- C. Motion to suppress
- D. ISP Forensic Services SOP revised 11-1-10
- E. IDAPA Rule 11.03.0
- F. ISP SOP revised 8-2-10
- G. History page
- H. Stay Order
- I. Correspondence
- J. Post employee profile
- K. State of WA v. Fausto and Ballow
- L. Motion to strike breath test

**THE HEARING EXAMINER HAS TAKEN JUDICIAL NOTICE OF THE  
FOLLOWING ITEMS:**

1. Records regularly maintained by ITD<sup>+</sup>
2. IDAPA<sup>§</sup> Rules and manuals
3. ISP<sup>\*\*</sup> standards and procedures<sup>++</sup> for breath testing instruments

PETITION FOR JUDICIAL REVIEW

4. Idaho Statutes, city, and county ordinances and procedures
5. Reported Court Decisions
6. NHTSA<sup>++</sup> driving while impaired and SFSTs<sup>ss</sup> testing manual

### **ADMINISTRATIVE PROCEEDINGS**\*\*\*

Trooper Jeffory R. Talbott testified:

1. Beyer's vehicle was observed making an illegal right turn.
2. The illegal turn is not indicate on the DVD.
3. Times in the record are based upon his watch.
4. Beyer failed two of the three SFSTs.
5. Beyer did not fail the one leg stand SFST.
6. Beyer was detained and not arrested.
7. Beyer was placed in the patrol vehicle's back seat.
8. Beyer was not handcuffed and his feet were hanging outside of the passenger door.
9. Beyer's mouth was checked for foreign material prior to start of the monitoring period.
10. Stood within two to three feet away from of Beyer.
11. Beyer stated he was not going to give a breath sample.
12. Beyer was informed about submitting to a blood test.
13. Beyer was arrested and handcuffed.
14. A few minutes later, Beyer said he would take a breath test.
15. Restarted Beyer's monitoring period.
16. Stood next to Beyer during the second monitoring period.
17. The monitoring period was approximately 15 minutes and 30 seconds.

Beyer testified:

1. Drove into the right lane and then merged into the left lane of travel.

Mr. Stroschein's final comments and arguments:

1. Exhibit 4 notes Idaho Department of Law Enforcement (IDLE).

PETITION FOR JUDICIAL REVIEW

2. There has not been an IDLE for more than ten years.
3. In 2008, the Lifeloc FC20 was approved in Idaho as a breath-testing instrument.
4. ISP not IDLE approved the Lifeloc FC20's methods and standards.
5. Idaho Code §18-8004(4) requires a laboratory for evidentiary testing.
6. ISP Forensic Services failed to comply with this statutory requirement.
7. This proceeding should be vacated pursuant to Idaho Code §18-8002A(7)(d), since Trooper Talbott did not state he followed ISP standards.
8. Pursuant to case law, a monitoring period cannot occur while the driver is in the back seat of a patrol vehicle especially when the police officer is distracted on other things.
9. The Lifeloc FC20 training requires a time when the fifteen-minute monitoring period started.
10. Based upon the times noted in the record, impossible for a fifteen-minute monitoring period to occur.

### **FINDINGS OF FACT**

I, having heard the testimony; having heard the issues raised by the driver; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact:

**PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER HAS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ALL ISSUES RAISED BY THE PETITIONER.**

**1.**

**DID TROOPER TALBOTT HAVE LEGAL CAUSE TO STOP THE VEHICLE  
BEYER WAS DRIVING?**

1. Trooper Talbott observed the vehicle driven by Beyer fail to turn into the correct lane of travel as required by Idaho Code §49-644.
2. Although the traffic violation is not shown in Exhibit B, Exhibit B demonstrates Trooper Talbott had explained to Beyer how he illegally made the turn.
3. Pursuant to Idaho Code §18-8002A(7) Beyer bears the burden of proof by the preponderance of the evidence.
4. Beyer's testimony is given the same weight as given to Trooper Talbott's live testimony and sworn statement.
5. Because Beyer's testimony and Trooper Talbott's live testimony and sworn statement are equally contradictory, as required by Idaho Code, Beyer must provide evidence to support his position.
6. Beyer's testimony alone in this case does not outweigh Trooper Talbott's live testimony or sworn statement.
7. Beyer did not meet his burden of proof.
8. Trooper Talbott had legal cause to stop the vehicle driven by Beyer.

**2.**

**DID TROOPER TALBOTT HAVE LEGAL CAUSE TO BELIEVE BEYER  
VIOLATED IDAHO CODE §18-8004?**

1. Trooper Talbott observed Beyer driving a motor vehicle.
2. Beyer exhibited the following behaviors:
  - a. Smelled of an alcoholic beverage
  - b. Admitted to consuming alcoholic beverages
  - c. Glassy eyes
  - d. Bloodshot eyes
3. Beyer met or exceeded the minimum decision points on the horizontal gaze nystagmus and the 9-step walk and turn SFSTs.

4. Since Beyer failed **two** (plural) of the **three** SFSTs, Exhibit 4's narrative is correct and not ambiguous by stating Beyer *performed and failed the tests* (plural).
4. Exhibit L noted certain situations regarding the inadequacies of Trooper Talbott administering the SFSTs.
5. Even without considering the SFSTs, Trooper Talbott's observations of Beyer, as set forth in Exhibit 4's DUI NOTES are sufficient for requesting an evidentiary test from Beyer.
6. Idaho Code §18-8002A(5)(b)(v) provides the police officer's sworn statement shall state that *the person was lawfully arrested*.
7. Although Beyer was initially detained in order for him to submit to a breath test, Trooper Talbott's testimony at this ALS proceeding indicated how Beyer was lawfully arrested after Beyer refused the evidentiary breath test.
8. Trooper Talbott had sufficient legal cause to arrest Beyer and request an evidentiary test.

### **3.**

#### **DID THE EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §§18-8004, 18-8004C, OR 18-8006?**

1. The analyses of Beyer's breath samples indicated a BrAC<sup>+++</sup> of insufficient/.165/.158.
2. Based upon statements Trooper Talbott made to Beyer regarding needles used for blood testing, Exhibit L provides Beyer was threatened to take a breath test.
3. Beyer did not provide any testimony to support Exhibit L's speculation.
4. Pursuant to Idaho Code §18-8002A(7) Beyer believing he was threatened to take a breath test is not one of the exclusive issues that can be raised in an ALS hearing.
5. Since the record demonstrates Beyer submitted to and failed a breath test, Beyer was in violation of Idaho Code §18-8004.

**4.**

**WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE AND ISP FORENSIC SERVICES SOPs?**

1. Trooper Talbott's affidavit states the evidentiary test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.
2. The standard language in Trooper Talbott's sworn statement (Exhibit 4) does state Department of Law Enforcement (DLE) and not Idaho State Police (ISP).
3. As of July 1, 2000, DLE's name was changed to Idaho State Police.
4. With DLE and ISP being the same, the record is accurate and in compliance with statute in setting forth the proper authority.
5. Since DLE and ISP are one of the same, the Hearing Examiner can infer that Exhibit 3's boilerplate language refers to ISP just as it did to DLE prior to July 1, 2000.
6. It can also be inferred that since DLE is now ISP, the Lifeloc FC20 is an acceptable and approved breath-testing instrument within the state of Idaho and was properly used to test Beyer's breath sample.
7. ISP Forensic Services SOP § 6 requires a driver to be monitored for fifteen minutes prior to an evidentiary breath test.
8. Beyer argued he was not properly monitored based upon the times in the record and the area where Trooper Talbott was located during the monitoring period.
9. Based upon the times noted in Exhibit B, Beyer was monitored for at least fifteen minutes prior to his breath test (see Exhibit B from 02:43:29 to Beyer's first attempt at blowing into the Lifeloc FC20 at 02:59.01).
10. Unlike what is stated in Exhibit L, Exhibit B shows Beyer was warned not to burp, vomit, or regurgitate.
11. Pursuant to ISP Forensic Services SOP § 6, a police officer is not required to state this warning to a driver prior to the monitoring

period.

12. After the warning and prior to Beyer's breath test, Exhibit B does not set forth Beyer did anything or admitting to do anything that would have skewed his breath test results during the monitoring period.
13. After the start of the monitoring period and while Trooper Talbott was outside and next to Beyer, Exhibit B demonstrates Trooper Talbott continuously communicated with Beyer.
14. State vs. Remsburg (126 Idaho 340) states that during the observation period, the operator of a breath testing instrument does not need to stare continuously at the driver for the full fifteen minute monitoring period.
15. Remsburg further provides that the level of surveillance by the police officer of the driver during the observation must in the police officer's mind accomplish the requirements set forth in ISP Forensic Services SOP Section 6.
16. Trooper Talbott's testimony lacks any statement that he was unable to monitor Beyer as required by ISP Forensic Services SOP § 6.
17. Even when Trooper Talbott's attention was diverted to other situations during the monitoring period (including Trooper Talbott yelling to a tow truck driver for less than 8 seconds) Exhibit B and additionally Beyer failed to provide any proof that Trooper Talbott's other senses than sight were unable to assist in monitoring Beyer.
18. Added assumptions were made in Exhibit L regarding outside influences affecting Beyer's monitoring period.
19. However, Beyer did not offer testimony at this ALS hearing to support what is noted in Exhibit L nor has he submitted any proof by the preponderance of the evidence to back these assumptions.
20. Upon review of the Lifeloc FC20's manual and ISP Forensic Services SOPs, there is no mandate for the operator of a breath-testing instrument to indicate a time when the monitoring period commences on the duplicate printout from a breath-testing instrument.



21. Beyer's evidentiary test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.

**5.**

**DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY  
WHEN THE TEST WAS ADMINISTERED?**

1. The evidentiary breath-testing instrument used to test Beyer's breath sample completed a valid performance verification check at 04:20 hours on November 06, 2010.
2. The valid performance verification check approved the instrument for evidentiary testing in accordance with ISP Forensic Services SOP.
3. The evidentiary testing instrument functioned properly when the test was administered.

**6.**

**WAS BEYER ADVISED OF THE POSSIBLE SUSPENSION OF HIS IDAHO  
DRIVING PRIVILEGES?**

1. Beyer was played the Idaho Code §§18-8002 and 18-8002A advisory recording prior to submitting to the evidentiary test.
2. Beyer was advised of the consequences of refusing or failing evidentiary testing pursuant to Idaho Code §§18-8002 and 18-8002A.

**7.**

**ADDITIONAL ISSUES**

22. Exhibit I's issues of another state's "confidence interval" of breath testing instruments as provided in Exhibit K is for ISP Forensic Services to consider and address.
23. Issues noted in Exhibit K are not issues that can be raised in this ALS proceeding pursuant to Idaho Code §18-8002A(7).
24. ISP Forensic Services changing standards for breath testing instruments is a policy of another agency and the reasons for the

changes are unknown by me.

25. Arguments noted in Exhibit C regarding the ISP Forensic Services changes to the SOPs have been read but will not be ruled upon since such arguments cannot be address or considered in this ALS hearing pursuant to Idaho Code §18-8002A(7).

#### **CONCLUSION OF LAW**

**CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT, I CONCLUDE THAT ALL OF THE REQUIREMENTS FOR SUSPENSION OF THE PETITIONER'S DRIVING PRIVILEGES SET FORTH IN IDAHO CODE §§18-8002 AND 18-8002A WERE COMPLIED WITH IN THIS CASE.**

**THE FOLLOWING ORDER IS RENDERED:**

#### **ORDER**

**THE STAY ORDER IS HEREBY QUASHED AND THE SUSPENSION SET FORTH IN THE NOTICE OF SUSPENSION FOR FAILURE OF EVIDENTIARY TESTING SERVED BY TROOPER TALBOTT ON NOVEMBER 06, 2010, SHALL BE REINSTATED FOR 90 DAYS COMMENCING ON DECEMBER 29, 2010, AND REMAIN IN EFFECT THROUGH MARCH 29, 2011.**

DATED this 23<sup>rd</sup> day of December 2010

A handwritten signature in black ink, appearing to read "Eric G. Moody". The signature is fluid and cursive, with the first name "Eric" and last name "Moody" clearly distinguishable.

Eric G. Moody

ADMINISTRATIVE HEARING EXAMINER

## **FINAL ORDER**

(Hearings pursuant to section 18-8002A, I.C.)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one (21) days of its receipt, the motion will be deemed denied.

Alternatively, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

1. A hearing was held;
2. The final agency actions were taken; or
3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

## Endnotes

\*Idaho's Implied Consent Statute

†Idaho Transportation Department's (ITD hereafter) exhibits are numeric, Petitioner's exhibits are alpha

‡Idaho Transportation Department

§Idaho's Administrative Procedure Act

\*\*Idaho State Police

††Hereafter SOPs

‡‡National Highway Transportation Safety Administration

§§Standardized field sobriety tests

\*\*\*Argument and testimony is summarized from record of hearing

†††Breath Alcohol Concentration

FILED

2010 DEC 27 PM 3 16

PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
*[Signature]*  
DEPUTY

CHARLES M. STROSCHEIN  
CLARK and FEENEY  
Attorneys for Petitioner  
1229 Main Street  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208)743-9516  
Idaho State Bar No. 3058

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

CV10-02748

In the Matter of the  
Driving Privileges of:

GEORGE JAY BEYER, JR,  
Petitioner.

IDT File No. 648000035832  
Idaho D. L. No. JA363481B

EXPARTE MOTION FOR STAY  
ON PENDING JUDICIAL  
REVIEW

COMES NOW, GEORGE JAY BEYER, JR, the Petitioner in the above-entitled  
matter by and through his undersigned Attorney of Record, CHARLES M. STROSCHEIN,  
of the firm of Clark & Feeney, and pursuant to Idaho Code Section 67-5274 hereby  
respectfully moves this Court for entry of an Order staying the execution and/or enforcement  
of the Findings of Fact and Conclusions of Law and Order previously entered in this matter  
on or about December 23, 2010, which sustains the suspension of the Petitioner's driver's  
license or privileges allegedly for failure of evidentiary testing for alcohol concentration  
pursuant to Idaho Code Section 18-8002A. Relief is requested upon grounds which include,  
but are not limited to, the following:

21

1. Petitioner has filed a timely Petition for Judicial Review from the Findings of Fact and Conclusions of Law and Order;

2. A stay of the Findings of Fact and Conclusions of Law and Order and suspension of Mr. Beyer's driver's license or privileges is necessary to preserve his driving privileges during the pendency of a judicial review. Without such relief, Mr. Beyer will be necessarily denied, as a practical matter, the relief which he is seeking by way of his petition for judicial review; and

3. The Petitioner has several viable defenses to the license suspension, as were presented to the hearing officer in this matter. Those defenses include but are not limited to the following:

A. Whether or not the arresting trooper, the operator of the breath test machine, failed to comply with the requirements for a breath test; and

B. Whether or not the arresting trooper had failed to comply with Idaho Code § 18-8002(A).

C. Whether the hearing officer failed to comply with obvious case precedent regarding the trooper's diverted attention outside interferences since he was outside his vehicle. Instead of monitoring Mr. Beyer, the trooper started yelling at a tow truck driver.

D. Whether the hearing officer failed to acknowledge the fact that the Trooper's testimony was found not to be creditable. The hearing officer failed to note the lack of credibility in the trooper's testimony. The hearing officer's decision is also contrary

to the record and should require this Court find that Mr. Beyer's testimony is more credible  
1 then the trooper's testimony which was found to be faulty.

2 4. A stay is necessary in the interests of justice.

3 5. The Petitioner asks for an expedited hearing to protect his due process rights  
4 regarding his ability to drive and suspension that will take effect on December 29, 2010.  
5

6 DATED this 27<sup>th</sup> day of December, 2010.

7 CLARK and FEENEY

8  
9 By 

10 Charles M. Stroschein, a member of the firm.  
11 Attorneys for Respondent.

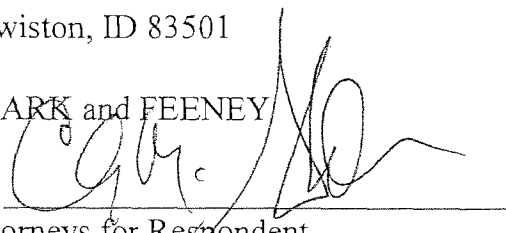
12 I hereby certify on the 27<sup>th</sup>  
13 day of December 2010, a true copy  
14 of the foregoing instrument

15 was: ☒ Mailed  
☒ Faxed  
☐ Hand delivered  
☐ Overnight mail to:

16 Idaho Transportation Department  
17 Driver Services Section  
18 P O Box 7129  
19 Boise ID 83707  
Facsimile: (208) 332-7810

20 Edwin L. Litteneker  
21 Attorney at Law  
22 PO Box 321  
23 322 Main St.  
24 Lewiston, ID 83501

25 CLARK and FEENEY

26 By   
Attorneys for Respondent



FILED

2010 DEC 27 PM 3 56

PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
*[Signature]*  
DEPUTY

CHARLES M. STROSCHEIN  
CLARK and FEENEY  
Attorneys for Driver  
1229 Main Street  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208)743-9516  
Idaho State Bar No. 3058

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of the  
Driving Privileges of:

GEORGE JAY BEYER, JR.,  
Petitioner.

Case No. **CV10-02748**

IDT File No. 648000035832  
Idaho D. L. No. JA3633481B

**EXPARTE ORDER FOR STAY  
ON PENDING JUDICIAL  
REVIEW**

The motion of the Petitioner for stay pending judicial review having come on duly and  
regularly before this court, and good cause appearing therefore;

NOW, THEREFORE, IT IS HEREBY ORDERED that the execution and/or  
enforcement of the Findings of Fact and Conclusions of Law and Order previously entered  
in this matter on December 23, 2010, suspending Petitioner's driver's license or privileges  
be, and the same is hereby stayed during the pendency of judicial review of said order.

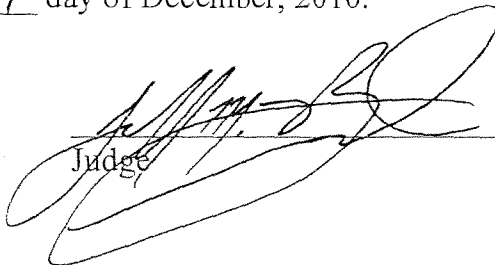
EXPARTE ORDER FOR STAY ON  
PENDING JUDICIAL REVIEW

-1-

24

Petitioner's driving privileges are therefore ordered reinstated during the pendency of judicial review.

DATED this 27 day of December, 2010.

  
Judge

I hereby certify on the 28  
day of December, 2010, a true copy  
of the foregoing instrument

was: ☐ Mailed  
☐ Faxed  
☒ Hand delivered  
☐ Overnight mail to:

Idaho Transportation Department  
Driver Services Section  
P O Box 7129  
Boise ID 83707  
Facsimile: (208) 332-7810

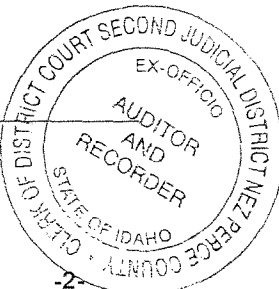
Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
PO Box 321  
322 Main St.  
Lewiston, ID 83501

Charles M. Stroschein  
Clark and Feeney  
1229 Main Street  
P.O. Box 285  
Lewiston ID, 83501

*Hand Delivered  
12/27/2010*

CLERK OF THE COURT

By   
Deputy



EXPARTE ORDER FOR STAY ON  
PENDING JUDICIAL REVIEW

LAW OFFICES OF  
CLARK AND FEENEY, LLP  
LEWISTON, IDAHO 83501

Beth Schiller  
Administrative Assistant, Driver Services  
Idaho Transportation Department  
3311 West State Street  
P.O. Box 7129  
Boise, Idaho 83701-1129  
Telephone: (208) 334-8755  
Facsimile: (208) 332-2002

FILED

2011 JAN 10 AM 9 40

PATTY O. WEEKS  
*Patty O. Weeks*  
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

George Jacob Beyer, Jr.,	)	
	)	
Petitioner,	)	Case No. <b>CV10-02748</b>
	)	
v.	)	<b>NOTICE OF LODGING</b>
	)	<b>OF AGENCY RECORD</b>
State of Idaho,	)	
Department of Transportation	)	
	)	
Respondent.	)	
_____	)	

Beth Schiller, Administrative Assistant of the Idaho Transportation Department, hereby gives notice pursuant to I.R.C.P. 84(j) of lodging of the agency record in the above-captioned matter. The parties shall have fourteen (14) days from the date of the mailing of this notice in which to file with the agency any objections. If no objections to the record are filed with the agency within fourteen (14) days, the record shall be deemed settled. Parties may pick up a copy of the record between the hours of 8:00 a.m. and 5:00 p.m. at the Idaho Transportation Department, 3311 West State Street, Boise, Idaho 83703.

The Agency Record consists of the following documents:

<u>Description</u>		<u>Page Number</u>
Notice of Suspension and Temporary Permit	STATE'S EXHIBIT 1	1-2
Evidentiary Test Results	STATE'S EXHIBIT 2	3
Instrument Operation Logsheet	STATE'S EXHIBIT 3	4
Sworn Statement	STATE'S EXHIBIT 4	5-7
Influence Report	STATE'S EXHIBIT 5	8
Copy of Citation #ISP0035832	STATE'S EXHIBIT 6	9
Copy of Petitioner's Drivers License	STATE'S EXHIBIT 7	10
Envelope from Law Enforcement Agency	STATE'S EXHIBIT 8	11
Certification of Receipt of Law Enforcement Documents	STATE'S EXHIBIT 9	12
Petitioner's Request for Hearing	STATE'S EXHIBIT 10	13-18
Petitioner's Request for Subpoenas	STATE'S EXHIBIT 11	19-20
Petitioner's Notice of Appearance	STATE'S EXHIBIT 12	21-22
Petitioner's Motion for Discovery Order	STATE'S EXHIBIT 13	23-26
Petitioner's Driver License Record	STATE'S EXHIBIT 14	27-31
Subpoena-Civil	STATE'S EXHIBIT 15	32
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Order	STATE'S EXHIBIT 18	35
Order	STATE'S EXHIBIT 19	36
Order	STATE'S EXHIBIT 20	37
Portable Breath Testing Instrument Inspection/Certification	PETITIONER'S EXHIBIT A	38-40
Audio Visual	PETITIONER'S EXHIBIT B	DVD
Motion to Suppress Breath Test	PETITIONER'S EXHIBIT C	41-44
ISP Standard Operating Procedure Revised 11/01/2010	PETITIONER'S EXHIBIT D	45-66
ISP Rules Governing Alcohol Testing	PETITIONER'S EXHIBIT E	67-71
ISP Standard Operating Procedure Revised 08/20/2010	PETITIONER'S EXHIBIT F	72-90
History Page	PETITIONER'S EXHIBIT G	91-92
Stay Order	PETITIONER'S EXHIBIT H	93
Correspondence - Attorney	PETITIONER'S EXHIBIT I	94
Idaho POST Academy Employee Profile	PETITIONER'S EXHIBIT J	95-96
State of Washington vs. Fausto and Ballow	PETITIONER'S EXHIBIT K	97-128
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Notice of Telephone Hearing		137-151
Findings of Fact and Conclusions of Law and Order		152-164
Petition for Judicial Review		165-180
Ex Parte Motion for Stay on Pending Judicial Review		181-187
Ex Parte Order for Stay on Pending Judicial Review		188-190
Correspondence - Transcript		191

As of this DATE, January 5, 2011, a Transcript has [ ], has not [ X ] been requested by the petitioner or his attorney.

DATED this 5th day of January, 2011.

Beth Schiller

Beth Schiller

Idaho Transportation Department

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

CHARLES STROSCHEIN  
ATTORNEY AT LAW  
P. O. DRAWER 285  
LEWISTON, ID 83501

X U.S. MAIL  
    HAND DELIVERED  
    OVERNIGHT MAIL  
    TELECOPY (FAX)

EDWIN LITTENEKER  
ATTORNEY AT LAW

X ELECTRONIC MAIL  
    HAND DELIVERED  
    OVERNIGHT MAIL  
    TELECOPY (FAX)

Beth Schiller  
Beth Schiller  
Idaho Transportation Department

FILED

2011 JAN 18 PM 4 24

PATRICIA O. REEDS  
CLERK OF THE DISTRICT COURT

DEPUTY

CHARLES M. STROSCHEIN  
CLARK and FEENEY, LLP  
Attorneys for Petitioner  
1229 Main Street  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208)743-9516  
Idaho State Bar No. 3058

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of the  
Driving Privileges of:

GEORGE JAY BEYER, JR.,  
Petitioner.

Case No. 2010-02748

IDT File No. 648000035832  
Idaho D. L. No. JA3633481B

**RESPONSE TO NOTICE OF  
LODGING OF AGENCY RECORD.**

COMES NOW, the Petitioner, George Beyer, by and through his undersigned attorney of record and hereby requests that the agency produce the record by mail to counsel. It is unfair for the State to require Nez Perce County petitioners to go to the Idaho Transportation Department in Boise, Idaho to pick up the administrative records. Counsel for Mr. Beyer has been doing administrative license suspension matters since the statute was first enacted. Never has counsel been required to go to Boise and get the record, it has always be sent.

RESPONSE TO NOTICE OF  
LODGING OF AGENCY RECORD

1


1 The Court might want to note that Beth Schiller is not an attorney but yet she seems  
2 to be filing pleadings in Nez Perce County as though she was. The State has an attorney,  
3 Edwin Litteneker. The Court might want to enter some sort of order noting that Ms.  
4 Schiller should be sanctioned for pleadings in the State of Idaho. The State has an attorney  
5 of record in the case.  
6

7 Mr. Beyer is prejudiced by this failure to forward the record because there is a  
8 fourteen (14) day window of objection. The Court needs to note that and potentially enter a stay  
9 regarding objections to the agency record because of this issue raised by Ms. Schiller's  
10 failure to supply agency record.  
11

12 In addition, the petitioner does want a transcript of the ALS hearing. Pursuant to  
13 I.R.C.P., Rule 16(b), a scheduling conference should be set.  
14

15 DATED this 18 day of January, 2011.

16 CLARK and FEENEY, LLP

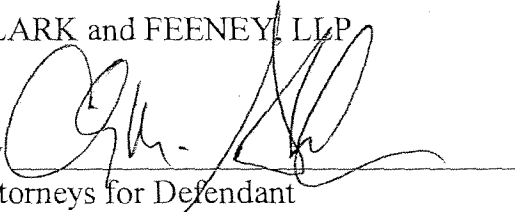
17   
18 By \_\_\_\_\_  
19 Charles M. Stroschein, a member of  
20 the firm. Attorneys for Petitioner  
21  
22  
23  
24



1  
2  
3 I hereby certify on the 18  
4 day of January, 2011, a true copy  
5 of the foregoing instrument  
6 was: ☒ Mailed  
7 ☐ Faxed  
8 ☐ Hand delivered  
9 ☐ Overnight mail to:

10 Edwin L. Litteneker  
11 Special Deputy Attorney General  
12 Idaho Transportation Department  
13 PO Box 321  
14 322 Main St.  
15 Lewiston, ID 83501

16 CLARK and FEENEY, LLP

17 By   
18 Attorneys for Defendant  
19  
20  
21  
22  
23  
24  
25  
26

RESPONSE TO NOTICE OF  
LODGING OF AGENCY RECORD

Beth Schiller  
Administrative Assistant, Driver Services  
Idaho Transportation Department  
3311 West State Street  
P.O. Box 7129  
Boise, Idaho 83701-1129  
Telephone: (208) 334-8755  
Facsimile: (208) 332-2002

FILED

2011 JAN 24 AM 9 43

PATY S. JONES  
CLERK OF THE DISTRICT COURT  
*[Signature]*  
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

George Jacob Beyer, Jr., )  
 )  
Petitioner, )  
 )  
v. )  
 )  
State of Idaho, )  
Department of Transportation )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No. **CV10-02748**

**NOTICE OF FILING  
AGENCY RECORD**

Pursuant to I.R.C.P. 84(k), the attached agency record in the above entitled matter is now  
deemed settled and is hereby filed.

DATED this 20th day of January, 2011.

*Beth Schiller*  
Beth Schiller  
Idaho Transportation Department

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

CHARLES STROSCHEIN  
ATTORNEY AT LAW  
P. O. DRAWER 285  
LEWISTON, ID 83501

X U.S. MAIL  
    HAND DELIVERED  
    OVERNIGHT MAIL  
    TELECOPY (FAX)

EDWIN LITTENEKER  
ATTORNEY AT LAW

X ELECTRONIC MAIL  
    HAND DELIVERED  
    OVERNIGHT MAIL  
    TELECOPY (FAX)

Beth Schiller  
Beth Schiller  
Idaho Transportation Department

BETH SCHILLER  
ADMINISTRATIVE ASSISTANT, DRIVER SERVICES  
IDAHO TRANSPORTATION DEPARTMENT  
3311 WEST STATE STREET  
POST OFFICE BOX 7129  
BOISE ID 83707-1129  
TELEPHONE: (208) 334-8755  
FACSIMILE: (208) 332-2002

FILED  
2011 JAN 24 AM 9 43

PALLY O. WELLS  
CLERK OF DISTRICT COURT  
DEPUTY  
*P. O. Wells*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

GEORGE JACOB BEYER, JR.,

PETITIONER,

v.

STATE OF IDAHO,  
DEPARTMENT OF TRANSPORTATION,

RESPONDENT,

CASE No. **CV10-02748**

**AGENCY RECORD**

THE FOLLOWING IS A LISTING OF THE DOCUMENTS CONSTITUTING THE AGENCY RECORD IN THIS MATTER:


**INDEX OF DOCUMENTS**

<u>Description</u>		<u>Page Number</u>
Notice of Suspension and Temporary Permit	STATE'S EXHIBIT 1	1-2
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AGENCY RECORD

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Audio Visual	PETITIONER'S EXHIBIT B	DVD
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ISP Standard Operating Procedure Revised 11/01/2010	PETITIONER'S EXHIBIT D	45-66
ISP Rules Governing Alcohol Testing	PETITIONER'S EXHIBIT E	67-71
ISP Standard Operating Procedure Revised 08/20/2010	PETITIONER'S EXHIBIT F	72-90
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Correspondence – Transcript		191
Correspondence – Transcript (2)		192

DATED THIS 20TH DAY OF JANUARY, 2011.

  
 Beth Schiller  
 Idaho Transportation Department



**NOTICE OF SUSPENSION** for Failure of Evidentiary Testing  
(Accessory for Sections 18-8002 and 18-8002A, Idaho Code)

DR # L10000993

Issued To:

BEYER GEORGE J JR  
Last Name First Middle  
1510 ALDER DR  
Mailing Address  
LEWISTON IN 83501  
City State Zip

NEZ PERCE 11/6/10 0238  
County of Arrest Date of Arrest Time of Arrest  
[Redacted] [Redacted]  
Driver's License Number State License Class  
ISP0035832 IN A  
Citation #  
Operating CMV? ☐ Yes ☒ No  
Transporting Hazmat? ☐ Yes ☒ No

**SUSPENSION ADVISORY**

- I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. You are required by law to take one or more evidentiary tests to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional tests made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary tests to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body.
- If you refuse to take or complete any of the offered tests pursuant to Section 18-8002, Idaho Code:
  - You are subject to a civil penalty of two hundred fifty dollars (\$250).
  - Your Idaho driver's license or permit will be seized if you have it in your possession, and if it is current and valid you will be issued a temporary permit. Non-resident licenses will not be seized and will be valid in Idaho for thirty (30) days from the service of this notice of suspension unless modified or restricted by the court, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
  - You have a right to submit a written request within seven (7) days to the Magistrate Court of NEZ PERCE County for a hearing to show cause why you refused to submit to or complete evidentiary testing and why your driver's license should not be suspended.
  - If you do not request a hearing or do not prevail at the hearing, the court will sustain the civil penalty and your license will be suspended with absolutely no driving privileges for one (1) year if this is your first refusal; and two (2) years if this is your second refusal within ten (10) years.
- If you take and fail the evidentiary test(s) pursuant to Section 18-8002A, Idaho Code:
  - Your Idaho driver's license or permit will be seized if you have it in your possession, and if it is current and valid you will be issued a temporary permit. Non-resident licenses will not be seized and shall be valid in Idaho for thirty (30) days from the service of this notice of suspension, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
  - I will serve you with this **NOTICE OF SUSPENSION** that becomes effective thirty days from the date of service on this **NOTICE**, suspending your driver's license or privileges. If this is your first failure of an evidentiary test your driver's license or driving privileges will be suspended for ninety (90) days, with absolutely no driving privileges during the first thirty (30) days. You may request restricted driving privileges for the remaining sixty (60) days of the suspension. Restricted driving privileges will not allow you to operate a commercial motor vehicle. If this is not your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind during that period.
  - You have the right to an administrative hearing on the suspension before the **IDAHO TRANSPORTATION DEPARTMENT** to show cause why you failed the evidentiary test and why your driver's license should not be suspended. The request must be made in writing and be received by the department within seven (7) calendar days from the date of service of this **NOTICE OF SUSPENSION**. You also have the right to judicial review of the Hearing Officer's decision.
- If you become enrolled in and are a participant in good standing in a drug court approved by the supreme court drug court and mental health court coordinating committee under the provisions of chapter 56, title 19, Idaho Code, you shall be eligible for restricted noncommercial driving privileges for the purpose of getting to and from work, school or an alcohol treatment program, which may be granted by the presiding judge of the drug court, provided that you have served a period of absolute suspension of driving privileges of at least forty five (45) days, that an ignition interlock device is installed on each of the motor vehicles owned or operated, or both, by you and that you have shown proof of financial responsibility.

**THIS SUSPENSION FOR FAILURE OR REFUSAL OF THE EVIDENTIARY TEST(S) IS SEPARATE FROM ANY OTHER SUSPENSION ORDERED BY THE COURT.**

**— PLEASE REFER TO THE BACK OF THIS SUSPENSION NOTICE FOR MORE INFORMATION —**

**NOTICE OF SUSPENSION:** If you have failed the evidentiary test(s), your driving privileges are hereby suspended per #3 above, commencing thirty (30) days from the date of service of this notice. If a blood or urine test was administered, the department may serve a *Notice of Suspension* upon receipt of the test results.

Date of Service: 11/6/10

**This Section Provides Temporary Driving Privileges.**

(If the driver was operating a commercial vehicle, this permit will not provide commercial driving privileges of any kind.)

If issued, this permit grants the same driving restrictions and privileges as those granted by the license/permit seized (except as indicated above), and shall be valid for thirty (30) days from the date you were served this *Notice of Suspension* for failure or refusal of the evidentiary test(s), unless it is canceled or restricted by the court.

Permit Issued? ☒ Yes ☐ No License Surrendered? ☒ Yes ☐ No  
A permit was not issued: ☐ Suspended ☐ Not in Possession ☐ Invalid ☐ Expired ☐ Issued by Another Jurisdiction ☐ Not Licensed

Signature of Temporary Licensee (if you are issued a permit, it is not valid until you sign it)

Signature of Reporting Officer: [Redacted] Print Name and I.D. Number of Reporting Officer (PRINT): AGENCY RECORDS CLERK R. TAUBERT 3431 Agency Code: 0002 Telephone Number: 799-5751  
Department use only: Failure: ☒ Breath ☐ Urine/Blood ☐ Refusal

NOV 10 2010 ITD REC'D

37

001

# **SUSPENSION INFORMATION:** The audio version of the suspension advisory substantially conforms to the written text of the suspension advisory.

## **FOR REFUSAL OF EVIDENTIARY TESTING (PURSUANT TO SECTION 18-8002, IDAHO CODE):**

You have the right to submit a written request within seven (7) days to the Magistrate Court indicated on the face of this notice for a hearing to show cause why you refused to submit to or complete evidentiary testing. This is your opportunity to show cause why you refused to submit or failed to complete evidentiary testing and why your driver's license should not be suspended. NOTE: A HEARING REQUEST FOR REFUSING EVIDENTIARY TESTING MUST BE SUBMITTED TO THE MAGISTRATE COURT.

If you fail to request a hearing or do not prevail at the hearing, you are subject to a \$250 civil penalty and the court will suspend your driver's license and privileges with absolutely no driving privileges for one (1) year for your first offense, or for two (2) years for your second offense within ten (10) years (unless you meet the provisions of section 4 as noted in the suspension advisory on the reverse side).

## **FOR FAILING EVIDENTIARY TESTING (PURSUANT TO SECTION 18-8002A, IDAHO CODE):**

You have been served this *Notice of Suspension* by a peace officer who had reasonable grounds to believe that you were operating a vehicle while intoxicated. After submitting to the test(s), you may, when practicable, have additional tests conducted (at your own expense).

If you take the evidentiary test(s) and the results indicate an alcohol concentration of .08 or greater (.02 or greater if you are under 21 years of age), or the presence of drugs or other intoxicating substances in violation of the provisions of Sections 18-8004, 18-8004C, and 18-8006, Idaho Code, the peace officer shall:

1. A. Seize your driver's license, (unless you are an out-of-state resident).
  - B. Issue you a temporary driving permit which shall be valid for thirty (30) days from the date of service indicated on the reverse side of this *Notice of Suspension*, if you have surrendered a current valid Idaho license. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
  - C. Serve you with this *Notice of Suspension* that becomes effective thirty (30) days after the date of service indicated on the reverse side of this notice. Failure of an evidentiary test will result in a ninety (90)-day suspension of driving privileges, with absolutely no driving privileges during the first thirty (30) days of the suspension. You may request restricted driving privileges during the final sixty (60) days of the suspension. If this is not your first failure of an evidentiary test within the last five (5) years, all of your driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind (unless you meet the provisions of section 4 as noted in the suspension advisory on the reverse side).
2. If you were operating or in physical control of a commercial vehicle and the evidentiary test results indicate an alcohol concentration of:
    - A. .04 to less than .08, your commercial driving privileges will be suspended for ninety (90) days. You will have absolutely no commercial driving privileges of any kind. Any temporary permit issued will be for Class D (non-commercial) driving privileges only.
    - B. .08 or greater (.02 or greater if you are under 21 years of age), or test results indicate the presence of drugs or other intoxicating substances, all of your driving privileges will be suspended for ninety (90) days, with possible Class D driving privileges for the final sixty (60) days of the suspension. You will have absolutely no commercial driving privileges of any kind during the full ninety (90)-day suspension.
    - C. If this is not your first failure of an evidentiary test within the last five (5) years, all of your driving privileges will be suspended for one (1) year and you will have absolutely no driving privileges of any kind (unless you meet the provisions of section 4 as noted on the reverse side).

## **HEARING REQUEST FOR FAILURE OF EVIDENTIARY TEST:**

You have the right to request an administrative hearing on the suspension **BEFORE THE IDAHO TRANSPORTATION DEPARTMENT**. Your request must be made in writing and be received by the department no later than seven (7) calendar days after the date of service of this *Notice of Suspension*. The request must state the issues intended to be raised at the hearing, and must include your name, date of birth, driver's license number, date of arrest, and daytime telephone number because the hearing will be held by telephone. The burden of proof, by preponderance of evidence, shall be upon the driver as to the issues raised in the hearing, pursuant to Section 18-8002A(7), Idaho Code.

If you request a hearing, it shall be held within twenty (20) days of the date the hearing request was received by the Idaho Transportation Department. (Section 18-8002A, Idaho Code) If you do not request an administrative hearing within seven (7) days of service of this *Notice of Suspension*, your right to contest the suspension is waived. This suspension is separate and apart from any suspension that may be ordered by the court as a result of any criminal charges that may be brought against you.

## **JUDICIAL REVIEW:**

You may appeal the decision of the Hearing Officer by seeking judicial review to the District Court. (Section 18-8002A, Idaho Code). Your appeal must be filed as a civil proceeding in District Court, pursuant to Chapter 52, Title 67, Idaho Code.

## **RESTRICTED DRIVING PERMITS:**

If your driving privileges are suspended for a period of ninety (90) days pursuant to Section 18-8002A, Idaho Code, you may request restricted driving privileges for the final sixty (60) days of the suspension (IDAPA Rule 39.02.70.) Restricted driving privileges will not allow you to operate a commercial motor vehicle. You may make your written request for restricted driving privileges any time after the service of this *Notice of Suspension*.

## **REINSTATEMENT REQUIREMENTS:**

Before being reinstated on this suspension, you will be required to pay a reinstatement fee. Any other suspension imposed by the court for this offense will require an additional reinstatement fee.

**To request an administrative hearing or apply for a restricted driving permit relating to an administrative license suspension for failing evidentiary testing:**

- Make your request in writing (including a daytime telephone number) to the Idaho Transportation Dept., Driver Services Section, PO Box 7129, Boise, ID 83707-1129, OR
- Fax your request to Driver Services at (208) 332-4124.

If you have questions or need additional information regarding this notice or your driving privileges, call Driver Services at 334-8735.

AGENCY RECORD

38

062

EXHIBIT

2

-----  
Difflac Technologies, Inc.  
Sequence v6.24d  
Serial No. 90203831  
Units: BrAC  
-----

Event No.: 100  
Date: 11/06/2010

#	Type	Time	Result
1)	Air Blank	02:57	.000
2)	Auto Test	02:57	Insuf.
3)	Air Blank	02:59	.000
4)	Auto Test	03:00	.165
5)	Air Blank	03:02	.000
6)	Auto Test	03:02	.158

Subject

I.D. BEYER

*[Signature]*  
Operator

NOV 10 2010 ITD REC'D



# INSTRUMENT OPERATIONS LOG

LOT NUMBER: 9110 / 9806

90203831-C2

LOCATION: ISP-RD

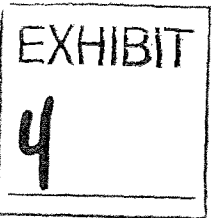
[illegible]

NOV 10 2010 ITD REC'D

EXHIBIT	3
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IN THE DISTRICT COURT OF THE 2ND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE



THE STATE OF IDAHO,  
Plaintiff,

COURT CASE NUMBER \_\_\_\_\_  
PROBABLE CAUSE AFFIDAVIT IN SUPPORT  
OF ARREST AND/OR REFUSAL TO TAKE TEST

**BEYER, George J.**  
Defendant.

DOB: [REDACTED]  
SSN/DL: [REDACTED]  
State: **Idaho**

State of Idaho,

County of **NEZ PERCE**

I, **Trooper Jeffory R. Talbott** the undersigned, being first duly sworn on oath, deposes and says that:

1. I am a peace officer employed by the Idaho State Police.
2. The defendant was arrested on **November 06, 2010** at **0238** hours for the crime of **driving while under the influence of alcohol, drugs, or any other intoxicating substances pursuant to Idaho code section 18-8004**. Second or more DUI offense in the last ten years? **No - Misdemeanor**  
Other Offenses:

3. Location of Occurrence: **Southbound Thain Rd approximately Bryden Ave.**

4. Identified the defendant as: **BEYER, George J. by: Driver's License**

5. Actual physical control established by: **Observation By Affiant**

6. I believe that there is probable cause to believe the defendant committed such crime because of the following facts:

(NOTE: You must state the source of all information provided below. State what you observed and what you learned from someone else, identifying that person):

41

PROBABLE CAUSE FOR STOP AND ARREST:

On November 06, 2010, approximately 0216 hours, I, Trooper Jeffory R. Talbott, stopped a silver, 2010 Chevrolet Camaro (Idaho registration N110561) for illegal right turn (turned into wrong lane) on southbound Thain Rd approximately Bryden Ave., Lewiston, Nez Perce County, Idaho. I could smell the strong odor of an alcoholic beverage coming from the vehicle. I noticed the driver's eyes were glassy and bloodshot. The driver identified himself as George J. BEYER (date of birth: [REDACTED]) with his Idaho Driver's License. BEYER admitted to consuming alcohol prior to driving. After running a driver's check, I asked BEYER to exit the vehicle to perform the standardized field sobriety tests. BEYER performed and failed the tests. I arrested BEYER for DUI. After listening to the ALS advisory and after the mandatory fifteen minute waiting period, BEYER provided three breath samples on the Lifeloc FC20. The results were insuf/.165/.158. I transported him to the Nez Perce County Jail. BEYER was booked into the Nez Perce County Jail for driving while under the influence of alcohol, drugs, or any other intoxicating substances pursuant to Idaho code section 18-8004. Video: Arbitrator

D.U. I. NOTES

Odor of alcoholic beverage: **Yes**  
Admitted drinking alcoholic beverage: **Yes**  
Slurred speech: **No**  
Impaired memory: **No**  
Glassy/bloodshot eyes: **Yes**

Sobriety Tests—Meets Decision Points?

Gaze Nystagmus: **Yes**  
Walk & Turn: **Yes**  
One Leg Stand: **No**  
Crash Involved: **No** Injury: **No**

Other:

Drugs Suspected: **No** Drug Recognition Evaluation Performed: **No**  
Reason Drugs are Suspected:

Prior to being offered the test, the defendant was substantially informed of the consequences of refusal and failure of the test as required by Section 18-8002 and 18-8002A, Idaho Code.

Defendant was tested for alcohol concentration, drugs or other intoxicating substances. The test(s) was/were performed in compliance with Section 18-8003 & 18-8004 (4), Idaho Code, and the standards and methods adopted by the Department of Law Enforcement.

BrAC: **insuf/.165/.158** Breath Instrument Type: **Lifeloc FC20** Serial # **90203831**  
Name of person administering breath test: **Jeffory R. Talbott**  
Date Certification Expires: **10/31/2012**

Videotape # **Arbitrator**

By my signature and in the presence of a person authorized to administer Oaths in the State of Idaho, I hereby solemnly swear that the information contained in this document and attached reports and documents that may be included herein is true and correct to the best of my information and belief.

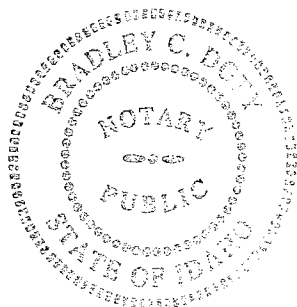
Signed: \_\_\_\_\_

(affiant)

Subscribed and sworn to me on \_\_\_\_\_

11/06/2010

(Date)



\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO

Residing at: \_\_\_\_\_

LATAHA

My Commission expires: \_\_\_\_\_

05/05/2011

### ORDER

Based upon the above Affidavit, the Court hereby finds that there is Probable Cause to believe that a crime or crimes has been committed, and that the Defendant committed said crime or crimes.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ hours.

\_\_\_\_\_  
MAGISTRATE

Idaho State Police  
INFLUENCE REPORT

L10000993

Defendant's Name BEMER, GEORGE T JR DOB 2/22/69

Contacts [ ] Yes [X] No PRE-TEST  
Glasses [ ] Yes [X] No Remove Glasses [ ]

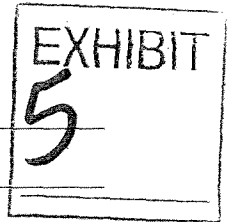
Eyes tracking equally [X] Yes [ ] No  
HORIZONTAL GAZE NYSTAGMUS

EYES

- L R  
☒ ☒ Eye does not pursue smoothly  
☒ ☒ Distinct Nystagmus at max. deviation  
☐ ☐ Nystagmus onset before 45 degrees

4 TOTAL

ADDITIONAL SOBRIETY TESTS



VERTICAL NYSTAGMUS ☐ Yes ☒ No

PUPIL SIZE \_\_\_\_\_ CONSTRICTED [ ] NORMAL [X] DILATED [ ]

WALK AND TURN

- ☐ Cannot keep balance during instructions  
☐ Starts too soon  
☐ Stops too soon  
☒ Misses heel to toe  
☒ Steps off line  
☒ Raises arms  
☐ Wrong number of steps  
☒ Improper turn  
☐ Cannot do test

4 Total

NYSTAGMUS

	0	1	2	3	4	5	6
0							
1							
2							
3							
4							
5							
6							
7							
8							

WALK  
AND  
TURN

OBSERVATIONS

Eye Color BLU Eye Condition WATERY BLOOD Speech \_\_\_\_\_  
Breath ODOR OF ALCOHOLIC BREATH  
Foot Wear TENNIS SHOES Ground Surface \_\_\_\_\_  
CONCRETE SIDEWALK

ONE LEG STAND

- ☒ Sways  
☐ Raises arms  
☐ Hops  
☐ Puts foot down  
☐ Cannot do test

1 Total

CHEMICAL TEST

☒ Breath ☐ Blood  
☐ Other Test Result 165/158  
☐ Refused test, Why? \_\_\_\_\_

Audio Tape (Y) N

Video Tape (Y) N

Officer's Signature [Signature] Date 11/6/10 **44**

EH 07 05-01

REV. 1/07

AGENCY RECORD

NOV 10 2010 ITD REC'D

008

# Idaho State Police - Uniform Citation

In the court designated below the undersigned certifies that he/she has just and reasonable grounds to believe and does believe that on:

Citation #:  
**ISP0035832**

Date/Time: **11/06/2010 02 40 AM**

DR#:

IN THE DISTRICT COURT OF THE **2ND**  
JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF **NEZ PERCE**  
STATE OF IDAHO

## VIOLATOR

Last Name: **BEYER** MI: **J**  
First Name: **GEORGE** DOB: **[REDACTED]**  
Hm. Address: **1510 ALDER DR** Phone: **[REDACTED]**  
City, St, Zip: **LEWISTON, ID 8350100000**  
Height: **602** Weight: **200** Sex: **M** Eyes: **GRN** Hair: **BRO**  
DL#: **[REDACTED]** DL State: **ID** Lic. Expires: **2013**  
Class: **D**  
Hazmat: **N** GVWR 26001+: **N** 16+ Persons: **N**  
Commercial vehicle driven by this driver: **N**  
Bus. Name:  
Bus. Addr:  
Bus. Phone:

## REGISTRATION

Yr. Veh: **2010** Veh. Lic #: **N110561** State: **ID**  
Make: **CHEV** Model: **CAM**  
Color: **SIL** Style: **2D**  
VIN: **2G1FK1EJ5A9140508**  
Carrier US DOT #:

## LOCATION

Upon a Public Street or Highway or Other Location Namely:  
**THAIN RD NEAR BRYDEN AVE**

## VIOLATIONS

Did commit the following Offense(s), In violation of State Statute,  
Infraction Citation: **N** Misdemeanor Citation: **Y**  
Posted Speed: Observed Speed: Accident: **N**  
Date/Time: **11/06/2010 02 16 AM**

Violation #1: **118-8004(1)(A) M**

**DRIVING UNDER THE INFLUENCE - BRAC .165/.158**

Violation #2:

Violation #3:

Violation #4:

## COURT INFORMATION

**NEZ PERCE COUNTY MAGISTRATE COURT**

**1230 MAIN STREET**

**LEWISTON, ID 83501**

**(208) 799-3043**

Court Date: **11/19/2010**

Court Time: **08 30 AM**

Fine #1: **MUST APPEAR**

Fine #2:

Fine #3:

Fine #4:

## SIGNATURE

I hereby certify service upon the defendant personally on **X** **11/06/2010**

Signature of Officer:

Officer name: **J TALBOTT**

Officer ID: **3431**

Agency Name: **IDAHO STATE POLICE**

Witnessing Officer:

Department:

Serial #:

## OFFICER NOTES

**EXHIBIT**

**6**

## READ CAREFULLY

This is a MISDEMENOR charge in which:

NOTE: If you fail to appear within the time allowed for your appearance, another charge of failure to appear may be filed and a warrant may be issued for your arrest.

1. You may be represented by a lawyer, which will be at your expense unless the judge finds you are indigent.
2. You are entitled to a trial by jury if requested by you.
3. PLEA OF NOT GUILTY: You may plead not guilty to the charge by appearing before the clerk of the court or the judge, within the time allowed for your appearance, at which time you will be given a trial date.
4. PLEA OF GUILTY: You may plead guilty to the charge by going to the clerk of the court, within the time allowed for your appearance, at which time you will be told if you can pay a fixed fine or whether it will be necessary for you to appear before the judge;  
OR  
You may have your fine determined by a judge at a time arranged with the clerk of the court, within the time allowed for your appearance.
5. You may call the clerk of the court to determine if you can sign a plea of guilty and pay the fine and costs by mail.

I plead guilty to the charges.

Defendant (if authorized by clerk of magistrate court)

MAIL TO:

**NEZ PERCE COUNTY MAGISTRATE**

**PO BOX 896**

**LEWISTON, ID 83501**

AGENCY RECORD

NOV 10 2010 ID REC'D 009

45

50051

BEYER, GEORGE JACOB JR  
JA363481B 02/22/69

NOV 10 2010 ITD REC

AGENCY RECORD

CLASS D

IDAHO DRIVER'S  
LICENSE

EXPIRES: 02/22/2013

NUMBER: JA363481B

ISSUED: 01/29/2009

RSTS:  
ENDR:



BEYER, GEORGE JACOB JR

1510 ALDER DR  
LEWISTON, ID 83501

DATE OF BIRTH  
02/22/1969

SEX: M  
HEIGHT: 6'02"  
WEIGHT: 200  
HAIR: BRO  
EYES: GRN

DONOR

*George Jacob Jr. Beyer*

EXHIBIT

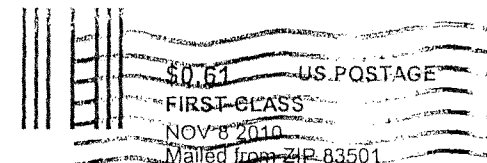
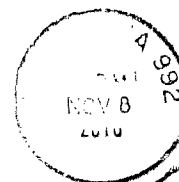
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46

AGENCY RECORD



Idaho State Police  
2700 N and S Highway  
Lewiston ID 83501-1732

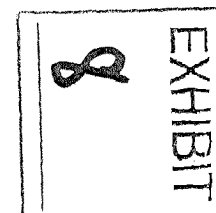
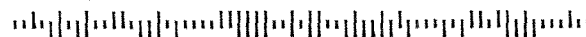


endicia.com

071V00550503

ATTN: Driver Services - ALS  
Idaho Transportation Department  
PO Box 7129  
Boise, ID 83707-1129

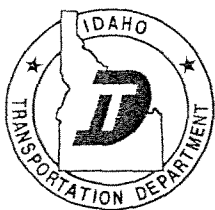
NOV 10 2010 ITD REC'D



011

47





**IDAHO TRANSPORTATION DEPARTMENT**

Driver Services • P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov

EXHIBIT  
9

**Certification of Receipt of Law Enforcement Documents**

I hereby certify that the following documents were received from the sender attached and/or incorporated together \*\*:

- |                                     |  |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | Notice of Suspension Advisory Form – Original    |
| <input checked="" type="checkbox"/> | Notice of Suspension Advisory Form – Goldenrod   |
| <input checked="" type="checkbox"/> | Evidentiary Test Results                         |
| <input checked="" type="checkbox"/> | Instrument Calibration Check                     |
| <input checked="" type="checkbox"/> | Instrument Operations Log                        |
| <input type="checkbox"/>            | Certificate of Analysis                          |
| <input type="checkbox"/>            | Instrument Certification                         |
| <input type="checkbox"/>            | Officer Certification and/or Business Card       |
| <input checked="" type="checkbox"/> | Sworn Statement                                  |
| <input type="checkbox"/>            | Incident/Arrest/Narrative Reports                |
| <input type="checkbox"/>            | Witness Statements                               |
| <input type="checkbox"/>            | LAW Incident Table                               |
| <input type="checkbox"/>            | Main Radio Log                                   |
| <input type="checkbox"/>            | Affidavit and/or Order Finding Probable Cause    |
| <input checked="" type="checkbox"/> | Influence Report                                 |
| <input type="checkbox"/>            | D.U.I. Intoxicant Report                         |
| <input type="checkbox"/>            | Pre-Booking Information Sheet                    |
| <input checked="" type="checkbox"/> | Photocopy of Citation(s)                         |
| <input type="checkbox"/>            | Evaluations                                      |
| <input type="checkbox"/>            | Impound Report                                   |
| <input type="checkbox"/>            | Towed Vehicle Report                             |
| <input type="checkbox"/>            | Field Sobriety Tests                             |
| <input type="checkbox"/>            | Vehicle Collision Report                         |
| <input type="checkbox"/>            | Teletype Records                                 |
| <input type="checkbox"/>            | Request of Prosecuting Attorney for Information  |
| <input type="checkbox"/>            | Miranda Rights                                   |
| <input checked="" type="checkbox"/> | Driver License – evidenced by attached photocopy |

Other documents attached and/or incorporated together\*\*:

<input type="checkbox"/>	_____	<input type="checkbox"/>	_____
<input type="checkbox"/>	_____	<input type="checkbox"/>	_____
<input type="checkbox"/>	_____	<input type="checkbox"/>	_____

  
\_\_\_\_\_  
Signature of Driver Services Employee

\*\* Staples and other attaching devices are typically removed from documents for the purpose of photocopying and scanning.

AGENCY RECORD

Revised 7-2006

48

012

CHARLES M. STROSCHEIN  
CLARK and FEENEY, LLP  
Attorneys for Respondent  
The Train Station, Suite 201  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208) 743-9516  
Idaho State Bar No. 3058

EXHIBIT

10

VIA FACSIMILE ONLY (208) 332-7810

Idaho Transportation Department  
Driver Services Section

RE: GEORGE JAY BEYER, JR.  
DOB: [REDACTED]  
SS/DL#: [REDACTED]  
ARRESTED: November 6, 2010

**REQUEST FOR HEARING**

COMES NOW GEORGE JAY BEYER, JR. (herein referred to as Respondent) by and through his Attorney of Record, CHARLES M. STROSCHEIN, of the law firm Clark and Feeney, LLP, and pursuant to Idaho Code Section 18-8002A hereby requests a hearing before the Idaho Transportation Department regarding that proposed Administrative License Suspension.

The issues which shall be raised at the hearing include, but are not limited to, the following:

1. Whether the arresting officer had probable cause and/or legal cause to stop and/or detain the Respondent;

2. Whether the arresting officer had probable cause and/or legal cause to believe the Respondent had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs, or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code;

3. Whether the test results showed an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C, or 18-8006, Idaho Code. Specifically, this issue shall also include whether the test results showed an alcohol concentration or the presence of drugs in violation of the said section of the Idaho Code at the time that the arresting officer took possession of Respondent's drivers license, issued a temporary permit and/or issued the notice of suspension.

4. Whether the test(s) for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were conducted in accordance with the requirements of section 18-8004(4), Idaho Code. Idaho Code Section 18-8004(4) provides in pertinent part as follows:

"...Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho State Police or by a laboratory approved by the Idaho State Police under the provisions of approved and certification standards to be set by that department, or by any other method approved by the Idaho State Police..."

Since the Idaho Department of Law Enforcement or Idaho State Police has adopted Alcohol Testing Regulations (herein referred to as the ATR's) set forth and cited as IDAPA 11.03, the issue will include whether the test(s) were conducted in accord with said regulations. To the extent that the ATR's require (i.e. see IDAPA 11.03.4, 3) that tests be administered in

conformity with standards established by the department in the form of policy statements and training manuals, the issue also includes whether the tests were conducted in accord with such standards issued in the form of policy statements and training manuals. Since the ATR's at 6,1 therein also require that all policies in effect when the alcohol program was managed by the Department of Health and Welfare shall continue to be in effect in the Department of Law Enforcement or Idaho State Police until the policy is changed or deleted by the Idaho State Police, the issue also includes whether the test was conducted in accord with the policies of the Idaho State Police which are continued in effect, and which are set forth in the Rules Governing the Performance of Forensic Alcohol Examination cited at IDAPA 16.02.7001 et seq.

5. Whether the Respondent was informed of the consequences of submitting to evidentiary testing as required in Idaho Code Section 18-8002A(2).

6. Request is made for an in-person administrative hearing in the State Office Building, 1118 F Street, Lewiston, Idaho or a place convenient to counsel and the State as required by due process.

7. Whether the Respondent was given an opportunity to have additional tests for alcohol concentration or for the presence of drugs or other intoxicating substances made by a person of his choosing and/or whether Respondent's failure or inability to obtain additional testing was due to denial by the arresting officer.

8. Whether Idaho Code Section 18-8002A violates Respondent's civil rights; whether Idaho Code Section 18-8002A violates Respondent's state and/or federal

constitutional rights including but not limited to his right to remain silent and right against self-incrimination.

9. Whether, due to delay in testing, the test results can be related back to the time of Respondent's observed driving by means of retrograde extrapolation. Included in this issue is the issue of whether the test results can be admissible and/or used in this proceeding because of substantial lack of time and resulting inaccuracy in establishing Respondent's alcohol concentration at the time of the driving.

10. Whether the arresting officer has forwarded the sworn statement required under Idaho Code Section 18-8002A(5)(b) within five (5) business days following service of the notice of suspension and whether a certified copy or duplicate original of test results accompanied the sworn statement also required pursuant to Idaho Code Section 18-8002(A)(5)(b).

11. Whether the request for breath test violated the Respondent's state and federal constitutional rights.

It is further requested that a subpoena duces tecum be issued by the hearing officer to compel the attendance of; (1) the arresting officer, Jeffroy R Talbot, of the Idaho State Polic, and whose serial number is 3431; and (2) the breath testing specialist Brandon Hopple, who changed the solution for the machine in question. Said arresting officer, Jeffroy R. Talbot, is to bring with him the following items:

1. Any and all written documents, notes, memoranda, letters and statements prepared in this case.

2. All documents or manuals of any kind or nature within the possession of you and/or the Idaho State Police which, in any way, evidence, describe, or relate to any and all formal or informal training with regard to field sobriety tests; and
3. Any and all written documents, notes, memoranda, manuals, training material, letters and statements that have been prepared with regarding to DUI training including but not limited to use of the Lifeloc.
4. The audio and video tape made of the stop of **George J. Beyer** on or about **November 6, 2010**.

The breath testing specialist that changes the solution to be compelled to bring the following:

1. All documents of any kind or nature within the possession of you and/or your employing law enforcement agency which, in any way, evidence, describe, constitute or relate to any and all formal certifications or approval of the Lifeloc that was used in this matter as a direct breath testing instrument issued by the State of Idaho, Idaho State Police since the instrument was approved for use in the State of Idaho;
2. All documents of any kind or nature within the possession of you and/or your employing law enforcement agency which, in any way, evidence, describe, constitute or relate to any and all booklets, manuals, written documents, notes, memoranda, manuals, training material, letters and statements regarding training operations, supervision or field service with respect to the Lifeloc or operation thereof and issued since the time the State of Idaho, Idaho State Police, approved the Lifeloc that was used in this matter for use in the State of Idaho; and
3. Any documents of any kind or nature within the possession of you and/or your employing law enforcement agency which, in any way, evidence, describe, constitute or relate to any schematic drawings, engineering design, and technical configurations of the Lifeloc that was used in this matter and any state, mode, or capacity of operation since said machine was authorized for use in the State of Idaho.
4. All documents of any kind or nature within possession of witness and/or your employing law enforcement agency which in any way evidence, describe, or relate to any and all booklets, manuals, memos, letters, notes, notices, or other written documents involving a policy of questioning of suspects or subjects regarding exposure to pain or solvent fumes or the consumption of any alcohol

or solvent, etc., other than ethyl alcohol issued since January, 1980, relating to DUI investigations or DUI training.

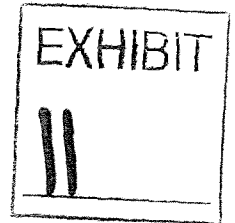
5. The Certificate of Accuracy for the wetbath or dry gas device used with the Lifeloc in this case; the Repco Marketing Inc., invoice for the BAC Certified Simulator Solution used in the wetbath device for the Lifeloc used in this case; and, the Certificate of Analysis for the simulator solution, which was prepared by Repco Marketing Inc., the manufacturer of the solution used with the wetbath device for the Lifeloc used in this case.
6. The maintenance log for the wetbath or dry gas alcohol breath test simulator; the manufacturer's and/or operator's manual or any other manual dealing with the operation, testing, calibration of the wetbath or dry gas alcohol breath test simulator; any and all records that verify that the solution used in the wetbath simulator meet the requirements of both the State of Idaho and of the United States Government with regard to breath testing devices, simulators and solutions, the standards as adopted by the National Technical Information Service and requirements of the National Highway Traffic Safety Administration; and, any and all rules promulgated by the State of Idaho with regard to solutions used in wetbath dry gas devices used in conjunction with the breath testing devices in the State of Idaho.

DATED this 12 day of November, 2010

CLARK and FEENEY

By 

Charles M. Stroschein, a member of the firm.  
Attorneys for Respondent.



CHARLES M. STROSCHEIN  
CLARK and FEENEY  
Attorneys for Respondent  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208) 743-9516  
Idaho State Bar No. 3058

VIA FACSIMILE ONLY (208) 332-7810

Idaho Transportation Department  
Driver Services Section

RE: GEORGE JAY BEYER, JR.  
DOB: [REDACTED]  
SS/DL#: [REDACTED]  
ARRESTED: November 6, 2010

**REQUEST FOR SUBPOENAS**

COMES NOW the above named Respondent, GEORGE JAY BEYER, JR., by and through his undersigned Attorney of Record, CHARLES M. STROSCHEIN, of the firm of Clark and Feeney, and hereby requests that the Hearing Officer issue a Subpoena Duces Tecum to the arresting officer, JEFFORY R TALBOT, Idaho State Police, to appear at the hearing in this matter.

The hearing officer is also requested to issue a Subpoena Duces Tecum to the breath testing specialist that did the calibration check of the Lifeloc that was used in this matter.

REQUEST FOR SUBPOENAS

-1-

55

AGENCY RECORD

019



DATED this 12 day of November, 2010.

CLARK and FEENEY

By 

Charles M. Stroschein, a member of the firm.  
Attorneys for Respondent.

CHARLES M. STROSCHEIN  
CLARK and FEENEY  
Attorneys for Respondent  
The Train Station, Suite 201  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208) 743-9516  
Facsimile: (208) 746-9160  
Email: [charm@clarkandfeeney.com](mailto:charm@clarkandfeeney.com)



VIA FACSIMILE ONLY (208) 332-7810

Idaho Transportation Department  
Driver Services Section

RE: GEORGE JAY BEYER, JR.  
DOB: [REDACTED]  
SS/DL#: [REDACTED]  
ARRESTED: November 6, 2010

NOTICE OF APPEARANCE

YOU WILL PLEASE TAKE NOTICE that Charles M. Stroschein of the law office of Clark and Feeney, LLP has been retained by and hereby appears for the above-named Respondent, GEORGE JAY BEYER, JR., in the above-entitled action and hereby appears in this proceeding; that said firm is retained as attorneys for Respondent herein, and hereby demands that a copy of all papers in this proceeding be served upon said law firm at its office located at The Train Station, 13th and Main, P. O. Drawer 285, Lewiston, Idaho, 83501 or by facsimile to (208) 746-9106.

NOTICE OF APPEARANCE

-1-

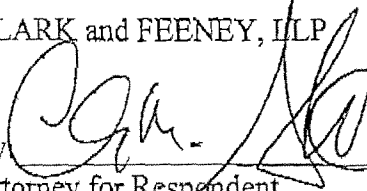
AGENCY RECORD

57

021

DATED this 12 day of November, 2010.

CLARK and FEENEY, LLP

By   
Attorney for Respondent

CHARLES M. STROSCHEIN  
CLARK and FEENEY, LLP  
Attorneys for Respondent  
The Train Station, Suite 201  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208) 743-9516  
Idaho State Bar No. 3058



VIA FACSIMILE ONLY (208) 332-7810

Idaho Transportation Department  
Driver Services Section

RE: GEORGE JAY BEYER, JR.  
DOB: [REDACTED]  
SS/DL#: [REDACTED]  
ARRESTED: November 6, 2010

**MOTION FOR DISCOVERY ORDER**

COMES NOW GEORGE JAY BEYER, JR. (herein referred to as Respondent) by and through his Attorney of Record, CHARLES M. STROSCHEIN, of the law firm Clark and Feeney, LLP, and pursuant to Idaho Rules of Civil Procedure and the Rules of Administrative Procedure 04.11.01.520, 04.11.01.521, and 04.11.01.522, and hereby requests that a discovery order be issued by the presiding officer to authorize or compel necessary discovery authorized by statute or rule. The Respondent has requested discovery. The Department has failed to answer the propounded discovery. The Rules of Administrative

Procedure specifically authorize production requests, written interrogatories, requests for admission, subpoena and statutory inspection examination including physical or mental examination, investigation, etc. See Rule 520. The presiding officer is requested in his order to provide a schedule for discovery. The Respondent would like a deposition schedule and a schedule for the department's responses to our already propounded production requests and written interrogatories. Respondent requests a schedule for Requests for Admission and Respondent's ability to inspect and examine and investigate the matters that are pertinent to the breath test that was done on the Respondent. The agency or agency staff may conduct a statutory inspection investigation, etc. at any time without filing a motion to compel discovery. This ability is not extended to the Respondent and therefore violates Respondent's due process rights. Due process does require that Respondent has the ability to conduct discovery. The administrative rules require it. The Rules of Civil Procedure require it. The criminal rules require it and the case law in this state requires due process and discovery.

An administrative hearing has been/has yet to be set on the Respondent's matter. The schedule for discovery must be done in such a fashion as to allow the Respondent the ability to gather all pertinent information to meet the burden of proof that is set out in the statute 18-8002A. Many of the decisions by hearing officers in this state have found that the Respondents have not met their burden trying to overcome the suspension. Respondent in this matter is trying to have the opportunity to do that. It is a breath test case and he should have every opportunity to meet his burden in a timely and meaningful fashion.

The Respondent requests a hearing on this, if the hearing officer is not inclined to immediately prepare a discovery order.

DATED this 12 day of November, 2010

CLARK and FEENEY, LLP

By 

Charles M. Stroschein, a member of the firm.  
Attorneys for Respondent.

**CLARK and FEENEY**

THE TRAIN STATION, SUITE 106  
1229 MAIN STREET  
P.O. DRAWER 285  
LEWISTON, IDAHO 83501

TELEPHONE: (208) 743-9516  
FAX: (208) 746-9160

---

FAX COVER SHEET

---

DATE: November 12, 2010  
FROM: CHARLES M. STROSCHEIN  
TO: IDAHO TRANSPORTATION DEPT  
FAX NO. (208) 332-7810  
RE: George J. Beyer

Please see attached Motion for Discovery Order, Request for Hearing, Request for Subpoenas and Notice of Appearance

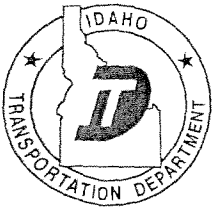
TOTAL NO OF PAGES (INCLUDING THIS COVER PAGE): 14

For missing or illegible pages please telephone (208)743-9516, and speak to: CHARITY

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Boise ID 83707-1129

(208) 334-8735  
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EXHIBIT

14

50040-IA

(208) 334-8736

REQUESTED BY: BEYER, GEORGE JACOB JR

PAGE 1

1510 ALDER DR  
LEWISTON ID 83501

D R I V E R L I C E N S E R E C O R D

11/17/2010

FOR:

BEYER, GEORGE JACOB JR

LICENSE NO: [REDACTED]

ISSUE TYPE: DL

BIRTH DATE: [REDACTED]

CLASS: D

1510 ALDER DR

ISSUED: 01/29/2009

OPR STATUS: VALID

LEWISTON

ID 83501

EXPIRES: 02/22/2013

CDL STATUS: NOTLIC

DRV TRAIN: YES

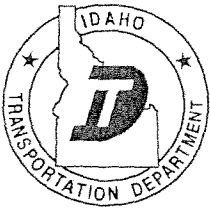
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ORD:	INFR			
FINE:	20.50	COSTS: 32.50 JAIL DAYS: 0 PROBATION: 0 BAC: .		
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L021	09/17/99	REQUEST FOR HEAR		648000737103
L027	09/17/99	ADMIN HEAR CASE		648000737103
L029	09/20/99	TELEPHONE HEARNG		648000737103
L02B	09/30/99	RESCHEDULE TELEP		648000737103
L044	10/04/99	ALS RESCIND		648000737103
MFLM	10/04/99	H.O.'S FINDINGS/FACTS		A00273408

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63





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50040-IA

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REQUESTED BY: BEYER, GEORGE JACOB JR

PAGE 2

1510 ALDER DR  
LEWISTON ID 83501

D R I V E R L I C E N S E R E C O R D 11/17/2010

FOR:

BEYER, GEORGE JACOB JR

LICENSE NO: JA363481B

ISSUE TYPE: DL

BIRTH DATE: 02/22/1969

CLASS: D

1510 ALDER DR

ISSUED: 01/29/2009

OPR STATUS: VALID

LEWISTON

ID 83501

EXPIRES: 02/22/2013

CDL STATUS: NOTLIC

DRV TRAIN: YES

RSTR: NONE

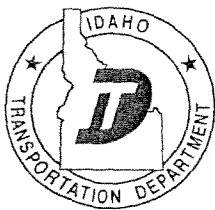
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FINE	0.00	COSTS: 32.50 JAIL DAYS: 0 PROBATION: 0 BAC: .		

CONTINUED

64

AGENCY RECORD

028

**IDAHO TRANSPORTATION DEPARTMENT**Driver Services • P.O. Box 7129  
Boise ID 83707-1129(208) 334-8735  
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50040-IA

(208) 334-8736

REQUESTED BY: BEYER, GEORGE JACOB JR

PAGE 3

1510 ALDER DR  
LEWISTON ID 83501**D R I V E R L I C E N S E R E C O R D 11/17/2010**

FOR:

BEYER, GEORGE JACOB JR

LICENSE NO: [REDACTED]

ISSUE TYPE: DL

BIRTH DATE: [REDACTED]

CLASS: D

1510 ALDER DR

ISSUED: [REDACTED]

OPR STATUS: VALID

LEWISTON

ID 83501

EXPIRES: 02/22/2013

CDL STATUS: NOTLIC

DRV TRAIN: YES

RSTR: NONE

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ORD:	INFR			
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L010	05/27/04	POINTS CAUTION		450000000013
COMM	12/26/08	RBM 12/26/2008		000000000

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65

**IDAHO TRANSPORTATION DEPARTMENT**

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(208) 334-8736

REQUESTED BY: BEYER, GEORGE JACOB JR

PAGE 4

1510 ALDER DR

LEWISTON

ID 83501

**D R I V E R   L I C E N S E   R E C O R D**

11/17/2010

FOR:

BEYER, GEORGE JACOB JR

LICENSE NO: [REDACTED]

ISSUE TYPE: DL

BIRTH DATE: [REDACTED]

CLASS: D

1510 ALDER DR

ISSUED: 01/29/2009

OPR STATUS: VALID

LEWISTON

ID 83501

EXPIRES: 02/22/2013

CDL STATUS: NOTLIC

DRV TRAIN: YES

RSTR: NONE

TYPE	DATE	DESC	CLS	DOC #
CITN	07/24/09	BASIC RULE	LOC:LATAH	PST:55 CIT: 65
CONV	08/13/09	GLTP PTS:3	CRT:MOSCOW	6571STAR9226

ORD: INFR

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CONV	09/09/10	GLTP PTS:3	CRT:			B00158201

FINE: 0.00 COSTS: 0.00 JAIL DAYS: 0 PROBATION: 0 BAC: .

COMM 11/17/10 STOP 78 DELETED BY: 50040 (DL) 11/12/2010

L027 11/17/10 ADMIN HEAR CASE

648000035832

PEND 12/06/10 ALS08+ORDRUG

TO 03/06/11

OPR 648000035832

MFLM A05777731

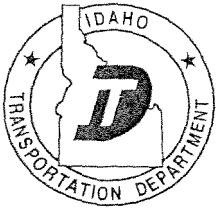
LICENSE IN FILE

12 MONTH POINTS: 3 24 MONTH POINTS: 6 36 MONTH POINTS: 6

POINTS ASSESSED ARE FOR DEPARTMENTAL USE ONLY, IN DETERMINING SUSPENSIONS  
FOR POINTS OR HABITUAL VIOLATIONS.

CONTINUED

66



IDAHO TRANSPORTATION DEPARTMENT

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REQUESTED BY: BEYER, GEORGE JACOB JR

PAGE 5

1510 ALDER DR  
LEWISTON ID 83501

D R I V E R L I C E N S E R E C O R D 11/17/2010

FOR:

BEYER, GEORGE JACOB JR

LICENSE NO: [REDACTED]

BIRTH DATE: [REDACTED]

CLASS: D

1510 ALDER DR

ISSUED: 01/29/2009

OPR STATUS: VALID

LEWISTON

ID 83501

EXPIRES: 02/22/2013

CDL STATUS: NOTLIC

DRV TRAIN: YES

RSTR: NONE

TYPE	DATE	DESC	CLS	DOC #
*** ACTION PENDING ***				
*** ACTION PENDING ***				

END OF EXISTING RECORD

AS AN EMPLOYEE OF THE TRANSPORTATION DEPARTMENT, I AM AN  
OFFICIALLY APPOINTED CUSTODIAN OF DRIVING RECORDS. I  
HEREBY CERTIFY THE FOREGOING IS A TRUE AND CORRECT COPY  
OF THE ORIGINAL DRIVING RECORDS OF THIS DEPARTMENT.

NOVEMBER 17, 2010

  
CUSTODIAN OF DRIVER RECORDS

SECTION 49-203 IDAHO CODE PROHIBITS THE RELEASE OF PERSONAL INFORMATION  
CONTAINED IN DRIVER LICENSE RECORDS TO UNAUTHORIZED PARTIES, WITHOUT THE  
EXPRESS WRITTEN CONSENT OF THE INDIVIDUAL THE INFORMATION PERTAINS TO.

\*\*\*END OF DLR PRINT\*\*\*

67

# SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.  
3311 W. STATE ST.  
BOISE, ID 83703

TELEPHONE # (208)332-2005  
PO BOX 7129  
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF  
IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE  
DRIVING PRIVILEGES OF  
GEORGE JACOB BEYER JR

SUBPOENA

EXHIBIT

15

THE STATE OF IDAHO TO: TROOPER JEFFORY TALBOTT-IDAHO STATE POLICE  
DISTRICT #2

You are hereby commanded to appear before Hearing Officer Eric G. Moody of the Idaho Transportation Department, as a witness in the above-entitled action, by means of a telephone conference call.

**YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 332-2005, PRIOR TO THE DAY OF THE SCHEDULED HEARING.**

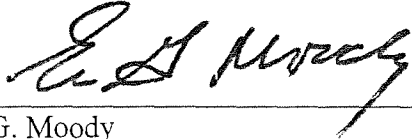
The hearing is scheduled on the 1<sup>st</sup> day of December 2010, at Three o'clock  
(3:00pm)Mountain Time.

**\*\*IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT CALLIE AT (208) 332-2005.\*\***

Further, prior to reporting, for your convenience you may confirm the status of your subpoena by calling the Idaho Transportation Department at (208)332-2005 before the hearing date listed above.

Witness my hand this 18<sup>th</sup> day of November 2010.

By

  
Eric G. Moody  
Hearing Officer

68

# SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.  
3311 W. STATE ST.  
BOISE, ID 83703

TELEPHONE # (208)332-2005  
PO BOX 7129  
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF IDAHO IN AND FOR THE IDAHO  
TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE  
DRIVING PRIVILEGES OF  
GEORGE JACOB BEYER JR

SUBPOENA DUCES TECUM

EXHIBIT

16

THE STATE OF IDAHO TO: TROOPER JEFF TALBOTT-IDAHO STATE POLICE DISTRICT #2

You are hereby commanded to produce evidence for an Administrative Hearing before the  
Idaho Transportation Department.

**You are commanded to provide the following items and documents:**

One copy of the Idaho State Police Certificate approving LIFELOC SN#90203831 for use.

**THE SUBPOENAED MATERIAL MUST BE RECEIVED BY DECEMBER 1, 2010.**

Notice To Party To Whom This Subpoena is Directed: This subpoena is issued upon the  
condition that the requesting party, Attorney Charles Stroschein, Phone #743-9516 shall advance the reasonable cost of  
producing the books, papers, documents, or tangible things, to the agency providing the evidence.

**\*\*IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT  
CALLIE AT (208) 332-2005.\*\***

Subpoenaed material must be sent via U.S. Mail or Fax to:

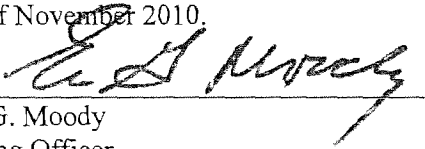
Idaho Transportation Department  
A.L.S. Hearing Unit  
Att: Callie  
PO Box 7129  
Boise ID 83707-1129  
FAX #208 332-2002

This subpoena has been issued in compliance with IDAPA rule 39.02.72.300.01

If you have any questions regarding this subpoena you can contact Callie at 332-2005.

Witness my hand this 18<sup>th</sup> day of November 2010.

By

  
Eric G. Moody  
Hearing Officer

69

***\*\*This subpoena is a single page document. Any additional documents requesting evidence  
attached to this subpoena have NOT been approved by the Hearing Examiner and should not be  
considered by the recipient of this subpoena. \*\****

# SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.  
3311 W. STATE ST.  
BOISE, ID 83703

TELEPHONE # (208)332-2005  
PO BOX 7129  
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF IDAHO IN AND FOR THE IDAHO  
TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE  
DRIVING PRIVILEGES OF  
GEORGE JACOB BEYER JR

SUBPOENA DUCES TECUM

EXHIBIT

17

THE STATE OF IDAHO TO: EVIDENCE CUSTODIAN-IDAHO STATE POLICE DISTRICT #2

You are hereby commanded to produce evidence for an Administrative Hearing before the  
Idaho Transportation Department.

**You are commanded to provide the following items and documents:**

One copy of any audio and video of the stop/arrest/evidentiary testing of  
George Jacob Beyer Jr on November 6, 2010, DR #L10000993.

**THE SUBPOENAED MATERIAL MUST BE RECEIVED BY DECEMBER 1, 2010.**

Notice To Party To Whom This Subpoena is Directed: This subpoena is issued upon the  
condition that the requesting party, Attorney Charles Stroschein, Phone #743-9516 shall advance the reasonable  
cost of producing the books, papers, documents, or tangible things, to the agency providing the evidence.

**\*\*IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY  
CONTACT CALLIE AT (208) 332-2005.\*\***

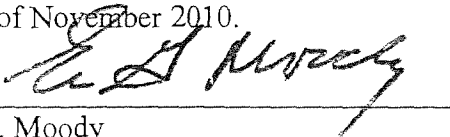
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Idaho Transportation Department  
A.L.S. Hearing Unit  
Att: Callie  
PO Box 7129  
Boise ID 83707-1129

This subpoena has been issued in compliance with IDAPA rule 39.02.72.300.01

If you have any questions regarding this subpoena you can contact Callie at 332-2005

Witness my hand this 18<sup>th</sup> day of November 2010.

By   
Eric G. Moody  
Hearing Officer

70

**\*\*This subpoena is a single page document. Any additional documents requesting evidence  
attached to this subpoena have NOT been approved by the Hearing Examiner and should not be  
considered by the recipient of this subpoena.\*\***

034

IN THE IDAHO TRANSPORTATION DEPARTMENT  
STATE OF IDAHO

EXHIBIT  
18

In the Matter of the  
Driving Privileges of

GEORGE JACOB BEYER JR

) File No. 648000035832

) D.L. No. JA363481B

) ORDER

The petitioner submitted a Motion for Discovery Order to the Hearing Examiner on November 12, 2010. The Hearing Examiner, having reviewed the Administrative License Suspension file and considered the Motion for Discovery Order and Request for Discovery and being advised in the premises and the law, hereby denies the petitioner's motion.

The Idaho Rules of Administrative Procedure of the Attorney General (IDAPA 04.11.01) Rule 521 provides that no party to an administrative proceeding is authorized to engage in discovery unless through agreement of the parties, discovery is authorized by the agency or upon order of the Hearing Examiner. The agency has not authorized any additional discovery.

The Rules Governing Administrative License Suspensions (IDAPA 39.02.72) Rule 400.01 provides that upon written request, the Department will provide to the Respondent records relating to the hearing "in the possession of the Department." It is the standard procedure of the Department to supply all documents and records to be submitted at the hearing of the matter to the Respondent in advance of the hearing.

It is clear from the limited time frames in which the administrative hearings must be held under I.C. § 18-8002A, that the legislature intended only limited discovery in these proceedings.

The request for Discovery exceeds the scope of what is required for the conduct and defense of the administrative hearing as outlined in I.C. § 18-8002A and seeks material and information not in the possession or under the control of the Department of Transportation.

The Department has complied with the petitioner's request for discovery regarding the information held by the Department and relevant to the Petitioner's hearing.

DATED this 18<sup>th</sup> day November of 2010.

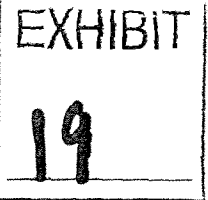


Eric G. Moody  
Hearing Examiner



IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO



IN THE MATTER OF THE  
DRIVING PRIVILEGES OF:

FILE # 648000035832  
D. L. # JA363481B

GEORGE JACOB BEYER JR

ORDER

The Petitioner submitted a request for an in-person administrative hearing to the Hearing Examiner on November 12, 2010. The Hearing Examiner, having reviewed Idaho Code §18-8002A and considered the request for an in-person administrative hearing, and being advised in the premises and the law, hereby denies the Petitioner's request.

Idaho Code §18-8002A(7) provides that the Department may conduct all hearings by telephone if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place. Due process requires the opportunity to be heard, not the opportunity to be heard in person. Based on the exhibits presented by the licensee, and without any evidence of any parties having difficulty in participating in the entire proceeding, the Petitioner has presented insufficient evidence to demonstrate why the hearing should not take place by telephone conference call. The Department has complied with all statutory requirements pursuant to Idaho Code §18-8002A, and it is determined that the hearing on the Administrative License Suspension of George Jacob Beyer Jr shall be conducted by telephone conference on December 1, 2010, at 3:00pm MST.

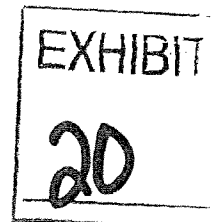
Dated, this 18<sup>th</sup> day of November, 2010.

A handwritten signature in cursive script, appearing to read "Eric G. Moody".

Eric G. Moody  
HEARING EXAMINER

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO



In the Matter of the  
Driving Privileges of

GEORGE JACOB BEYER JR

) File No. 648000035832  
) D.L. No. JA363481B  
)  
)  
)  
)

ORDER

Idaho Code §18-8002A(7) allows for a subpoena to be issued by the hearing examiner ordering the appearance of the arresting officer, and IDAPA 39.02.72.300.01 provides for issuance of a subpoena for tangible evidence. The Hearing Examiner has issued subpoenas for the evidence he deems relevant. All other subpoena requests are hereby denied.

DATED this 18<sup>th</sup> day of November 2010.

A handwritten signature in cursive script, appearing to read "Eric G. Moody".

Eric G. Moody  
Hearing Examiner

A

038

## SUBPOENA - CIVIL

IDAHO TRANSPORTATION DEPT.  
3311 W. STATE ST.  
BOISE, ID 83703

TELEPHONE # (208)332-2005  
PO BOX 7129  
BOISE, ID 83707

**COPY**

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF IDAHO IN AND FOR THE IDAHO  
TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE  
DRIVING PRIVILEGES OF  
GEORGE JACOB BEYER JR

SUBPOENA DUCES TECUM

THE STATE OF IDAHO TO: TROOPER JEFF TALBOTT-IDAHO STATE POLICE DISTRICT #2

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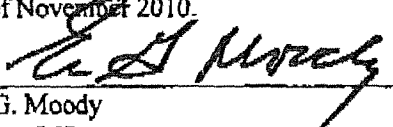
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Witness my hand this 18<sup>th</sup> day of November 2010.

By   
Eric G. Moody  
Hearing Officer

***\*\*This subpoena is a single page document. Any additional documents requesting evidence  
attached to this subpoena have NOT been approved by the Hearing Examiner and should not be  
considered by the recipient of this subpoena.\*\****

AGENCY RECORD

039



**Idaho State Police**  
**Region Two Patrol**  
**Diana, Administrative Assistant**  
**2700 N & S Hwy**  
**Lewiston, Idaho 83501**  
**Phone – 208-799-5150**  
**Fax – 208-799-5146**

<b>To:</b>	Callie @ ITD ALS Hearing Unit	<b>From:</b>	Diana
<b>Fax:</b>	208-332-2002	<b>Pages:</b>	including cover sheet 3
<b>Phone:</b>	208-332-2005	<b>Date:</b>	November 23, 2010
<b>Re:</b>	Certification Lifeloc SN#9023831	<b>CC:</b>	

☐ Urgent    ☒ For Review    ☐ Please Comment    ☐ Please Reply    ☐ Please Recycle

**Diana**

CHARLES M. STROSCHEIN  
CLARK and FEENEY  
Attorneys for Respondent  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208) 743-9516  
Idaho State Bar No. 3058

VIA FACSIMILE ONLY (208) 332-7810

Idaho Transportation Department  
Driver Services Section

RE: GEORGE JAY BEYER, JR.  
DOB: [REDACTED]  
SS/DL#: [REDACTED]  
ARRESTED: November 6, 2010

### MOTION TO SUPPRESS BREATH TEST

COMES NOW the Driver, GEORGE J. BEYER, by and through his undersigned attorney of record, Charles M. Stroschein of the law firm of Clark and Feeney, LLP, Lewiston, Idaho, and moves the hearing officer to suppress and/or strike the breath test result in this case. Idaho State Police (ISP) has failed to comply with the requirements of Idaho Code § 18-8004(4). Said statute states in part:

"Analysis of blood, urine or **breath** for the purposes of determining the alcohol concentration **shall** be performed by a **laboratory** operated by the Idaho State Police or by a laboratory approve by the Idaho State Police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho State Police."  
(emphasis added)

MOTION TO SUPPRESS  
BREATH TEST

-1-

AGENCY RECORD

041

The Idaho State Police, on September 1, 2010, has specifically changed their standard regarding a "laboratory: not to include breath testing instruments. IDAPA Rule 11.03.01.10.05 defines laboratory as follows:

"Laboratory" shall mean the place at which specialized devices, instruments and methods are used by trained personnel to measure the concentration of alcohol in samples of blood, or urine for law enforcement purposes."

On September 1, 2010, ISP struck the word "breath" from its definition of "laboratory". Pursuant to Idaho Code §18-8004(4) analysis of breath shall be performed by a laboratory operated by the Idaho State Police. There is now no requirement for proficiency testing or quality control based on the ISP's change in rules governing alcohol testing. There is now only a reference in the IDAPA rules to "checks". These "checks" do not meet the requirements of the Idaho Code § 18-8004(4) as the legislature specifically required that calibration approval and certification or quality control must be performed by a "laboratory" operated or approved by the Idaho State Police.

In fact, the ISP basically has very few standards as noted by the new SOP that took effect in November 2010. A copy of the new SOP is attached herewith as Exhibit "A". The new version of the IDAPA rules regarding alcohol testing is attached herewith as Exhibit "B". The SOP effective in August 2010 is attached as Exhibit "C". The revision dated August 27, 2010 is attached herewith as Exhibit "D".

MOTION TO SUPPRESS  
BREATH TEST

-2-

78

AGENCY RECORD

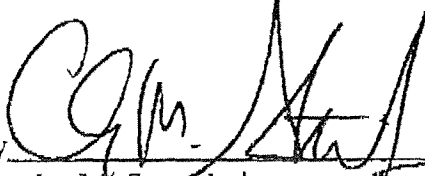
042

ISP has been making modifications to "standards" that have been set for years without any scientific study and the like. There is very little evidence of any scientific study, peer review or other scientific technique in determining the current standards used by ISP. One should view the changes to the SOP as simply an attempt to do away with any real standards for the breath testing system or any breath test given in the State of Idaho.

The hearing officer should note that the Idaho Code § 67-2901(6) specifically requires that the ISP operate and supervise a forensic laboratory which will provide, local agencies having responsibility for enforcement of the penal law of this State, assistance in the collection, preservation and analysis of evidence in criminal cases. There are now no forensic "laboratories" dealing with breath testing because of ISP's change to the IDAPA rules.

DATED this 1 day of December, 2010.

CLARK and FEENEY

By   
Charles M. Stroschein, a member of the firm.  
Attorneys for Respondent.

MOTION TO SUPPRESS  
BREATH TEST



**CLARK and FEENEY**

THE TRAIN STATION, SUITE 106  
1229 MAIN STREET  
P.O. DRAWER 285  
LEWISTON, IDAHO 83501

TELEPHONE: (208) 743-9516  
FAX: (208) 746-9160

---

**FAX COVER SHEET**

---

DATE: December 1, 2010  
FROM: CHARLES M. STROSCHEIN  
TO: ERIC G. MOODY  
IDAHO TRANSPORTATION DEPT  
FAX NO. (208) 332-2002  
RE: George J. Beyer

Please see attached *Motion to Suppress Breath Test*

TOTAL NO OF PAGES (INCLUDING THIS COVER PAGE): 52

For missing or illegible pages please telephone (208)743-9516, and speak to: CHARITY

The pages comprising this facsimile transmission contain confidential information from the office of Clark and Feeney. This information is intended solely for use by the individual entity named as the recipient hereof. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this transmission is prohibited. If you have received this transmission in error, please notify us by telephone immediately so we may arrange to retrieve this transmission at no cost to you.

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☐ Original will follow by:

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☐ Certified Mail  
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EXHIBIT  
D

~~EXHIBIT A~~

81

*Cover sheet submitted with Exhibit D*



CLARK  
D

## **6.0 Idaho Standard Operating Procedure**

### **Breath Alcohol Testing**

**Idaho State Police  
Forensic Services**

82

AGENCY RECORD

Idaho Breath Alcohol Standard Operating Procedure  
Issuing Authority—ISPPS Quality Manager  
Revision 2 Effective 11/01/2010  
Page 1 of 21

046

## Glossary

**Approved Vendor:** A source/provider/manufacture of an approved premixed alcohol simulator solution shall be explicitly approved as a vendor of premixed alcohol simulator solutions for distribution within Idaho.

**Breath Alcohol Test:** A series of separate breath samples provided during a breath testing sequence.

**Breath Alcohol Testing Sequence:** A sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by either the instrument or the Operator, but not both, and may consist of air blanks, performance verification, internal standard checks, and breath samples.

**Breath Testing Specialist (BTS):** An Operator who has completed an advanced training class taught by an employee of the Idaho State Police Forensic Services. BTS certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Certificate of Analysis:** A certificate stating that the premixed ethyl alcohol solutions used for performance verification have been tested and approved for use by the ISPFS.

**Certificate of Approval:** A certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of an Idaho State Police Forensic Services Lab Manager, and the effective date of the instrument approval.

**Changeover Class:** A training class for currently certified personnel during which they are taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists attend BTS training that qualifies them to perform BTS duties related to the instrument.

**Evidentiary Test:** A breath test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and community service or training tests performed with the instrument.

**Idaho State Police Forensic Services (ISPFS):** Formerly known as the Bureau of Forensic Services, the ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS is the administrative body for the breath alcohol testing program per IDAPA 11.03.01.

**MIP/MIC:** An abbreviation used to designate minor in possession or minor in consumption of alcohol.

**Operator Certification:** The condition of having satisfied the training requirements for administering breath alcohol tests as established by the ISPFS. Operator certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Operator:** An individual certified by the ISPFS as qualified by training to administer breath alcohol tests.

**Operator Class:** An ISPFS-approved training class for prospective or uncertified breath alcohol Operators. Currently certified Breath Testing Specialists may teach Operator classes.

**Performance Verification:** A verification of the accuracy of the breath testing instrument utilizing a simulator and a performance verification solution. Performance verification should be reported to three decimal places. While ISPFS uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check."

**Performance Verification Solution:** A premixed ethyl alcohol solution used for field performance verifications. The solution is provided by and/or approved by ISPFS.

**Recertification Class:** A training class for currently certified personnel, completion of which results in uninterrupted continuation of their Operator or BTS status for an additional 26 months.

**Waiting Period/Monitoring Period/Deprivation Period/Observation Period:** 15-minute period prior to administering a breath alcohol test, in which an officer monitors the test subject/individual.

## Breath Alcohol Standard Operating Procedure List of Revisions

<u>SOP Section</u>	<u>Topic</u>	<u>Date of Revision</u>
2	Delete reference to ALS	June 1, 1995
2	0.02/0.20 solutions	June 1, 1995
3.2.1	Valid breath tests	October 23, 1995
2.1	Alco-Sensor calibration checks	May 1, 1996
2.2	Intoxilyzer 5000 Calibration Checks Effective June, 1996	May 1, 1996
2.1.2	0.003 agreement	June 1, 1996
2.1.2	Operators may run calibration checks	July 1, 1996
2.1.2	Re-run a solution within 24 hours	September 6, 1996
2.1	All 3 solutions run within a 24-hour period	September 6, 1996
2	All 3 solutions run within a 24-hour period	September 6, 1996
2.1.2	Re-running of a solution	September 26, 1996
2.1	All solutions run within a 48-hour period Reference to "three" removed	September 26, 1996 Oct. 8, 1996
2	All 3 solutions run within a 48-hour period	September 26, 1996
2	More than three calibration solutions	October 8, 1996
2	Solution values no longer called in to BFS	April 1, 1997
2.1	Alco-Sensor and Intoxilyzer 5000 calibration check	August 1, 1998
2.2	Calibration checks for the Intoxilyzer 5000	February 11, 1999
	Name change, all references made to the Bureau of Forensic Services were changed to Idaho State Police Forensic Services.	August 1999
1.6	Record Management	August 1, 1999
2	Deleted sections on relocating, repairing, recalibrating, and loaning of instruments from previous revision.	August 1, 1999

84

1.2, 2.1, 2.2 3	Alco-Sensor and Intoxilyzer 5000 calibration checks Deleted sections on blood and urine samples for alcohol determination	August 1, 1999 August 1, 1999
1.6	Operator certification record management	January 29, 2001
1.2, and 3 2.1, 2.2	Reformat numbering Requirement for running 0.20 simulator solution	August 18, 2006
2.2.1.1.2.2	Changed 3-sample to "two print cards".	November 27, 2006
2.2.1.1.2.2 2.1.2.1 and 2.2.4	Deleted "simulator port" and "two print cards". Simulator temperature changed from "should" to "must".	May 14, 2007 May 14, 2007
2.2.1.1.2.2	Clarification of 0.20 calibration checks.	September 18, 2007
1.2	Added the Lifeloc FC20	February 13, 2008
1.5	Deleted requirement that the new instrument utilize the same technology if the BTS is currently certified	February 13, 2008
2	Modified the accepted range for simulator solutions to +/- 10%, eliminating the +/- 0.01 provision. Added "Established target values may be different from those shown on the bottle label"	February 13, 2008
2.2	Added Lifeloc FC20 calibration checks Intoxilyzer 5000 calibration is now section 2.3	February 13, 2008
2.	Modified to specifically allow use of the 0.20 during subject testing	February 13, 2008
Sections 1, 2, 3	General reformat for clarification. Combined Alcosensor and Lifeloc sections. Specifically, changed calibration requirement using the 0.20 reference solution from four (4) checks to two (2).	December 1, 2008
2.1.4, 2.2.3, 2.2.4, 2.2.5 And 2.2.10	Clarification: a "calibration check" consists of a pair of samples in sequence and both samples must be within the acceptable range before proceeding with subject testing. A 0.20 solution should be replaced every 20-25 samples. Clarified the correct procedure for performing a calibration check.	January 14, 2009
2.1.3, 2.1.4.1, 2.1.9	Clarification: Added " <i>before and after</i> " to the 0.08 and 0.20 calibration checks, within 24 hours of a subject test. The official time and date of the calibration check is the time and date recorded on the printout, <i>or the time and date recorded in the log, whichever corresponds to the calibration check referenced in section 2.1.3 or 2.1.4.1.</i>	July 7, 2009

85

## History Page

Revision #	Effective date	History
0	8/20/2010	The entire SOP was rewritten to incorporate language changes regarding performance verifications, and to clear-up ambiguities associated with the 0.20 verification and the relevance to cases not involving an 18-8004C charge. Scope and safety sections were added. Troubleshooting, MIP/MIC sections added.
1	8/27/2010	Deletions and/or additions to sections 2, 4.3.3, 4.4.1, 4.4.3, 4.4.5, 4.6.1.1, 5.1.2, 5.1.4, 5.1.4.1, 5.1.5, 5.2.4, 5.2.5, 6, 6.2.1, 6.2.3, 6.2.4, 7, 7.1, 7.1.1, 7.1.2, 7.1.2.2, 7.1.3, 7.1.4, 7.1.5, 8.
2	11/01/2010	Section 6.2 clarified for instrument specificity, added sections 6.2.2.3, 6.2.2.3.1 and 6.2.2.4, added section 8.0 for the MIP/MIC procedure, clarified section 5.1.3 for the use of 0.20 solutions, renamed document to 6.0

86

## Table of Contents:

<u>Section 2: Scope</u>	page 9
<u>Section 3: Safety</u>	page 9
<u>Section 4: Instrument and Operator Certification</u>	page 9
<u>Section 5: Performance Verification of Approved Breath Testing Instruments</u>	page 12
<u>Section 6: Evidentiary Testing Procedure</u>	page 16
<u>Section 7: Troubleshooting</u>	page 19
<u>Section 8: MIP/MIC Procedure</u>	page 21



# **1      *Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments.***

---

## **2      Scope**

This method describes the Idaho State Police Forensic Services (ISPFS) procedure, for use by agencies external to ISPFS, for the analysis of breath for the presence of volatile compounds using an approved breath testing instrument. This method provides for the quantitative analysis of ethanol.

Following all the recommendations of this external procedure will establish the scientific validity of the breath alcohol test. Failure to meet all of the recommendations within this procedure does not disqualify the breath alcohol test, but does allow for the questioning of the breath alcohol tests as it pertains to its foundation of admissibility in court. That foundation can be set, through testimony, by a breath testing specialist expert or ISPFS expert in breath testing as to the potential ramifications of the deviation from the procedure as stated.

## **3      Safety**

Within the discipline of breath alcohol testing, the general biohazard safety precautions should be followed. This is due to the potential infectious materials that may be ejected from the mouth during the sampling of the breath. Caution should be taken so as the expired breath is not directed towards the officer or other unrelated bystander.

## **4      Instrument and Operator Certification**

To ensure that minimum standards are met, individual breath testing instruments, Operators, and breath testing specialists (BTS) must be approved and certified by the Idaho State Police Forensic Services (ISPFS). The ISPFS will establish and maintain a list of approved instruments by manufacturer brand or model designation for use in the state.

**4.1      Approval of Breath Testing Instruments.** In order to be approved and certified each instrument must meet the following criteria:

**4.1.1** The instrument shall analyze a reference sample or analytical test standard, the results of which must agree within +/- 10% of the target value or such limits set by ISPFS.

88

- 4.1.2 The certification procedures shall be adequate and appropriate for the analysis of breath specimens for the determination of alcohol concentration for law enforcement.
- 4.1.3 Any other tests deemed necessary to correctly and adequately evaluate the instrument to give accurate results in routine breath alcohol testing.
- 4.2 The ISPFS may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof.
- 4.3 Operators become certified by completing a training class taught by an ISPFS certified Breath Testing Specialist (BTS). Certification is for 26 calendar months and expires the last day of the 26th month. Certification will allow the Operator to perform all functions required to obtain a valid breath alcohol test. It is the responsibility of the individual Operator to maintain their current certification; the ISPFS will not notify Operators that their certification is about to expire.
- 4.3.1 Recertification for another 26-month period is achieved by completing an ISPFS approved Operator class prior to the end of the 26th month.
- 4.3.2 If the individual fails to satisfactorily complete the class (including the written and practical tests), or allows their certification status to expire, he/she must retake the Operator class in order to become recertified.
- 4.3.3 If current Operator certification is expired, the individual is not certified to run evidentiary breath alcohol tests on the instrument in question until the Operator class is completed.
- 4.3.3.1 There are no grace periods or provisions for extension of Operator certification.
- 4.4 Breath Testing Specialists (BTS) are Operators who have completed an advanced training class and are ISPFS-certified to perform instrument maintenance, and provide both initial and recertification training for instrument Operators.
- 4.4.1 To obtain initial BTS certification, an individual must be currently certified as an Operator of that particular instrument. BTS certification is then obtained by completing an approved BTS training class.
- NOTE: The prior Operator status "on that particular instrument" requirement is waived for new instrumentation.
- 4.4.2 BTS Certification is valid for 26 calendar months.
- 4.4.3 If BTS certification is allowed to expire, the individual reverts to certified Operator status for 12 calendar months for that instrument. He/she may no longer perform any BTS specific duties relating to that particular instrument.

89

- 4.4.4 BTS certification is renewable by attending an approved BTS training class.
- 4.4.5 The Idaho State Police Forensic Services may revoke BTS certification for cause. Examples of what may constitute grounds for revocation may include falsification of records, failure to perform required performance verification, failure to successfully pass a BTS recertification class and failure to meet standards in conducting Operator training.
- 4.5 **Adoption of a new instrument** by an agency will require updating any BTS and Operators in that agency in the use of the new instrument.
  - 4.5.1 A currently certified BTS may become a certified BTS for a new instrument by completing an ISPFs approved BTS Instrumentation class.
  - 4.5.2 A currently certified Operator may certify on a new instrument by completing an ISPFs approved Operator Instrumentation Class for the new instrument.
  - 4.5.3 Individuals not currently certified as Operators must complete an Operator Class for each approved instrument.
- 4.6 **Record maintenance and management.** It is the responsibility of each individual agency to store performance verification records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of Operator certification.
  - 4.6.1 It is the responsibility of the agency to see that the said records are stored and maintained a minimum of (3) years in accordance with IDAPA 11.03.01.
    - 4.6.1.1 Records may be subject to periodic audit by the Idaho State Police Forensic Services.
  - 4.6.2 The Idaho State Police Forensic Services will not be responsible for the storage of such records not generated by ISPFs.

## 5. Performance Verification of Breath Testing Instruments

Performance verifications aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning correctly. Performance verifications are performed using a wet bath simulator performance verification solution. The solution is provided by and/or approved by ISPFS. The ISPFS analysis establishes the target value and acceptable range of the solutions used for the verification and includes the acceptable values on the Certificate of Analysis for each solution. Note: The ISPFS established target values may be different from those shown on the bottle label.

### 5.1 Alco-Sensor and Lifeloc FC20—Portable Breath Testing Instrument Performance Verification

5.1.1 The Alco-Sensor and Lifeloc FC20 portable breath testing instrument performance verification is run using approximately 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.

5.1.2 The performance verification using the 0.08 and 0.20 performance verification solutions consist of two samples.

5.1.3 A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 or 0.20 performance verification solution must be performed within 24 hours, before or after an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification. Reference 5.1.4.1 for clarification on the use of the 0.20 solution in this capacity.

5.1.3.1 A 0.08 performance verification solution should be replaced with fresh solution approximately every 25 verifications or every calendar month, whichever comes first.

5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications or until it reaches its expiration date, whichever comes first

**NOTE:** The 0.20 performance verification was implemented for the sole purpose of supporting the instruments' results for an 18-8004C charge. Failure to timely perform a 0.20 performance verification will not invalidate tests performed that yield results at other levels or in charges other than 18-8004C.

5.1.4.1 The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after an evidentiary test at any level. The 0.20 performance verification solution should not be used routinely for this purpose.

91

- 5.1.5 Acceptable results for a 0.08 or 0.20 performance verification is a pair of samples in sequence that are both within  $\pm 10\%$  of the performance verification solution target value. Target values and ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFS.

**NOTE:** Due to external factors associated with changing a performance verification solution the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three test series for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. The suggested troubleshooting procedure should be followed if the initial performance verification does not meet the acceptance criteria.

- 5.1.6 Temperature of the simulator must be between  $33.5^{\circ}\text{C}$  and  $34.5^{\circ}\text{C}$  in order for the performance verification results to be valid.

**NOTE:** The simulator may need to warm for approximately 15 minutes to ensure that the metal lid is also warm. If the lid is cold, condensation of alcohol vapor may occur producing low results.

- 5.1.7 Performance verification solutions should only be used prior to the expiration date on the label.
- 5.1.8 An agency may run additional performance verification solution levels at their discretion.
- 5.1.9 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log, whichever corresponds to the performance verification referenced in section 5.1.3 or 5.1.4.1.

## 5.2 Intoxilyzer 5000/EN Performance Verification

Intoxilyzer 5000/EN instruments must have a performance verification with each evidentiary test. If the performance verification is within the acceptable range for the lot of solution being used, then the instrument will be approved and the resulting breath samples will be deemed valid for evidentiary use.

- 5.2.1 Intoxilyzer 5000/EN performance verification is run using 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.
- 5.2.2 During each evidentiary breath alcohol test using the Intoxilyzer 5000/EN, a performance verification will be performed as directed by the instrument

testing sequence and recorded as SIM CHK on the printout. If the SIM CHK is not within the acceptable range for the solution lot being used, the testing sequence will abort and no breath samples will be obtained.

- 5.2.3 A two sample performance verification using a **0.08 performance verification solution** should be run and results logged each time a solution is replaced with fresh solution. A 0.08 performance verification solution should be replaced with fresh solution approximately every 100 samples or every calendar month, whichever comes first.
- 5.2.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications or until it reaches its expiration date, whichever comes first

**NOTE:** The 0.20 performance verification was implemented for the sole purpose of supporting the instruments' results for a 18-8004C charge. Failure to timely perform a 0.20 performance verification will not invalidate tests performed that yield results at other levels or in charges other than 18-8004C.

- 5.2.5 Acceptable results for a 0.08 or 0.20 performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results for each solution lot series are included in a certificate of analysis, prepared by, and available from, the ISPFS.

**NOTE:** Due to external factors associated with changing a performance verification solution the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three test series for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. Follow the suggested troubleshooting procedure if the initial performance verification does not meet the acceptance criteria.

- 5.2.6 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log.
- 5.2.7 Performance verification solutions should only be used prior to the expiration date as marked on the label.
- 5.2.8 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the performance verification results to be valid.
- 5.2.9 An agency may run additional performance verification solution levels at their discretion.

93

5.2.10 The BTS must set the correct acceptable range limits and performance verification solution lot number in the instrument before proceeding with evidentiary testing.

94

AGENCY RECORD

Idaho Breath Alcohol Standard Operating Procedure  
Issuing Authority---ISPFS Quality Manager  
Revision 2 Effective 11/01/2010  
Page 13 of 21

058

## 6. Evidentiary Testing Procedure

Proper testing procedure by certified Operators is necessary in order to provide accurate results. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

- 6.1 Prior to evidentiary breath alcohol testing, the subject/individual should be monitored for at least fifteen (15) minutes. Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the start of the 15 minute waiting period. During the monitoring period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate.

**NOTE:** If a foreign object/material is left in the mouth during the entirety of the 15 minute monitoring period, any potential external alcohol contamination will come into equilibrium with the subject/individual's body water and/or dissipate so as not to interfere with the results of the subsequent breath alcohol test.

- 6.1.1 The breath alcohol test must be administered by an Operator currently certified in the use of the instrument.
- 6.1.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.
- 6.1.3 The Operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.
- 6.1.4 During the monitoring period, the Operator must be alert for any event that might influence the accuracy of the breath alcohol test.
- 6.1.4.1 The Operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the Operator should begin another 15-minute waiting period before repeating the testing sequence.
- 6.1.4.2 If, during the 15-minute waiting period, the subject/individual vomits or regurgitates material from the stomach into the subject/individual's breath pathway, the 15-minute waiting period must begin again.
- 6.1.4.3 If there is doubt as to the events occurring during the 15 minute monitoring period, the officer should look at results of the duplicate breath samples for evidence of potential alcohol contamination. For clarification see section 6.2.2.2.



- 6.2 A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes apart, or more, for the ASIII's and the FC20's to allow for the dissipation of potential mouth alcohol contamination.

**NOTE:** A deficient or insufficient sample does not automatically invalidate a test sample.

- 6.2.1 If the subject/individual fails or refuses to provide a duplicate, adequate sample as requested by the Operator, the single test result shall be considered **valid**.

6.2.1.1 The Operator may repeat the testing sequence as required by circumstances.

6.2.1.2 The Operator should use a **new mouthpiece** for each series of tests.

- 6.2.2 A third breath sample is required if the first two results differ by more than 0.02.

6.2.2.1 Unless mouth alcohol is indicated or suspected, it is **not** necessary to repeat the 15-minute waiting period to obtain a third breath sample.

6.2.2.2 The results for duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individual's breath pathway, show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

6.2.2.3 In the event that all three samples fall outside the 0.02 correlation, and the officer suspects that mouth alcohol could have been a contributing factor, then they should restart the 15 minute observation period and retest the subject.

6.2.2.3.1 If the officer does not suspect that mouth alcohol was present, and that the sample variability was due to a lack of subject cooperation in providing the samples as requested, then the samples can be considered valid if all three samples are above the per se limit of prosecution.

6.2.2.4 If all three samples fall outside the 0.02 correlation, the officer may at their discretion elect to have a blood sample drawn for analysis in lieu of retesting the subject's breath alcohol concentration.

- 6.2.3 The Operator should log test results and retain printouts, if any, for possible use in court.

- 6.2.4 If a subject/individual fails or refuses to provide a duplicate, adequate sample as requested by the Operator, the results obtained are still considered valid by the ISPFS, **provided** the failure to supply the requested samples was the fault of the subject/individual and not the Operator.
- 6.2.5 If the second or third samples are lacking due to instrument failure, the Operator should attempt to utilize another instrument or have blood drawn.

## 7. Troubleshooting Procedure

Proper testing procedure by certified Operators is necessary in order to provide accurate results.

- 7.1 Performance verification: If, when performing the periodic performance verification, the instrument falls outside the limits of the verification, the troubleshooting guide should be used.

**NOTE:** This is a guide for troubleshooting performance verifications outside the verification limits and the procedure is recommended to streamline and isolate the potential cause of the problem. Strict adherence to the guidelines is not required.

- 7.1.1 The three sources of uncertainty when performing the periodic performance verifications are in the simulator setup and Operator technique, the simulator performance verification solution, and the instrument calibration itself.

- 7.1.2 If the first performance verification is outside the verification limits, the simulator setup and technique of the Operator performing the verification should be evaluated. The simulator should be evaluated to ensure that it is hooked up properly, uses short hoses, is properly warmed, is within temperature, the Operator blow technique is not too hard or soft, and that the Operator does not stop blowing until after the sample is taken.

- 7.1.2.1 The performance verification should be run a second time

- 7.1.2.2 If the performance verification is within the verification limits on the second try, the instrument passes the performance verification.

- 7.1.3 If the second performance verification is outside the verification limits, then the performance verification solution should be evaluated next.

- 7.1.3.1 The performance verification solution should be changed to a fresh solution.

- 7.1.3.2 The solution should be warmed for approximately 15 minutes, or until the temperature is within range, and the simulator lid is as warm as the simulator jar.

- 7.1.3.3 The performance verification may then be repeated.

- 7.1.4 If the third performance verification is outside the verification limits, the instrument must be taken out of service and sent to the ISPFS or an approved service provider.

- 7.1.5 Upon return from service, the instrument should be recertified by ISPFS before being put back into service.

7.2 Thermometers:

- 7.2.1 If a bubble forms in the thermometer, the Operator or BTS can place the thermometer in a freezer to draw the mercury (or equivalent) into the bulb of the thermometer. This should disperse the bubble.

## 8. Minors in Possession/Minors in Consumption Procedure

Breath testing instruments certified by ISPFS are often used in investigating violations of Idaho Code § 23-949 (punishment set forth by I.C. § 18-1502) or Idaho Code § 23-604 (punishment set forth by I.C. 18-1502), wherein a person under twenty-one (21) years of age is deemed to have possessed and consumed alcohol. Unlike the Driving Under the Influence statutes and their associations with per se limits of 0.08 and 0.20, a specific level of alcohol is not required to prove a violation of I.C. § 23-949 or § 23-604. There is no requirement that the State prove the person is impaired by alcohol. Rather, the presence or absence of alcohol is a determining factor for proving the offense. Therefore, there is a different standard operating procedure associated with this type of charge. The main purpose of the procedure outlined below is to rule out "mouth alcohol" as a potential contributing factor to the results given during the breath testing done for MIP/MIC cases.

- 8.1 15 minute observation period: The monitoring/observation period is not required for the MIP/MIC procedure. The duplicate samples, separated by approximately 2 minutes or more and within the 0.02 correlation, provide the evidence of consistent sample delivery, the absence of "mouth alcohol" as well as the absence of RFI (radio frequency interference) as a contributing factor to the results of the breath test.
- 8.2 MIP/MIC requirements:
  - 8.2.1 The breath alcohol test must be administered by an operator currently certified in the use of that instrument.
  - 8.2.2 The instrument used must be certified by ISPFS.
    - 8.2.2.1 The instrument only needs to be initially certified by ISPFS. Initial certification shows that the instrument responds to alcohols and not to acetone.
    - 8.2.2.2 The instrument used does not need to meet other requirements set forth in previous sections of this SOP. It does not need to be checked regularly or periodically with any of the 0.08 or 0.20 solutions.
  - 8.2.3 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.
  - 8.2.4 The officer should have the individual being tested remove all loose foreign material from their mouth before testing. The officer may allow the individual to briefly rinse their mouth out with water prior to the breath testing.

100

8.2.5 Any material containing alcohol left in the mouth during the entirety of the breath testing sampling could contribute to the results in the breath testing sequence. (For clarification refer to section 8.1)

8.3 Procedure:

A complete breath alcohol test includes two (2) valid breath samples taken from the subject and preceded by an air blank. The duplicate breath samples do not need to be consecutive samples. The individual breath samples should be 2 minutes or more apart, to allow for the dissipation of potential mouth alcohol contamination.

**NOTE:** A deficient or insufficient sample does not automatically invalidate a test sample.

8.3.1 If the subject/individual fails or refuses to provide a duplicate adequate sample as requested by the operator, the single test result will be considered valid.

8.3.1.1 The operator may repeat the testing sequence as required by circumstances.

8.3.1.2 The operator should use a new **mouthpiece** for each individual and for each series of tests (i.e. complete set of breath testing samples).

8.3.2 A third breath sample is required if the first two results differ by more than 0.02.

8.3.2.1 The results for duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject's breath pathway (mouth alcohol), show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

8.3.2.2 In the event that all three samples fall outside the 0.02 correlation, and the officer suspects that mouth alcohol could have been a contributing factor, then they should administer a 15 minute observation period and then retest the subject. If mouth alcohol is not suspected, then the officer may reinstruct the individual in the proper breath sample technique and retest the subject without administering a 15 minute observation.

8.3.3 The operator should manually log test results and/or retain printouts for possible use in court.

8.3.4 The instrument **should not** be in passive mode for the testing of subjects for the purposes of the previous sections.

#### 8.4 Passive mode:

- 8.4.1 The passive mode of testing using the Lifeloc FC20 or ASIII should be used for testing liquids or containers of liquid for the presence or absence of alcohol.
- 8.4.2 The passive mode can be used for screening purposes on individuals who are required to provide breath samples whenever requested by a law enforcement agency. Example may include but are not limited to: probationers, work release, parolees, prison inmates, etc.

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EXHIBIT  
B

# ~~EXHIBIT B~~

103

*Cover sheet submitted with Exhibit E*



**IDAPA 11 - IDAHO STATE POLICE****11.03.01 - RULES GOVERNING ALCOHOL TESTING****DOCKET NO. 11-0301-1001****NOTICE OF RULEMAKING - TEMPORARY AND PROPOSED RULE**

**EFFECTIVE DATE:** The effective date of the temporary rule is September 1, 2010.

**AUTHORITY:** In compliance with Sections 67-5221(1) and 67-5226, Idaho Code, notice is hereby given that this agency has adopted a temporary rule, and proposed rulemaking procedures have been initiated. The action is authorized pursuant to Section 67-2901, Idaho Code.

**PUBLIC HEARING SCHEDULE:** Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than October 20, 2010.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

**DESCRIPTIVE SUMMARY:** The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule and a nontechnical explanation of the substance and purpose of the proposed rulemaking:

The current language of the rule is confusing, appearing to imply that ISP must approve individual vendors of breath alcohol testing solutions, rather than approving the solutions provided by the manufacturer (which is the intent of the rule). The proposed amendment clarifies that ISP approves the solution provided by the manufacturer. Further, the amendment clarifies that breath alcohol testing is administered on the site of the traffic stop or at a police agency, and not in a laboratory.

**TEMPORARY RULE JUSTIFICATION:** Pursuant to Section 67-5226(1)(a), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate for the following reasons:

The current wording of the rule has led to suppression hearings in Idaho's courts, to suppress breath alcohol results. If the breath alcohol results are suppressed by the courts because of the current wording, DUI cases with breath test results would not be able to be prosecuted in Idaho. Not prosecuting DUI cases presents a public safety threat.

**FEE SUMMARY:** Pursuant to Section 67-5226(2), Idaho Code, the Governor has found that the fee or charge being imposed or increased is justified and necessary to avoid immediate danger and the fee is described herein: None.

**FISCAL IMPACT:** The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: N/A

**NEGOTIATED RULEMAKING:** Pursuant to Section 67-5220(2), Idaho Code, negotiated rulemaking was not conducted because there is no change to the intent of the rule; the amending language removes the existing ambiguity of interpretation regarding ISP's approval authority.

**INCORPORATION BY REFERENCE:** Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the materials cited are being incorporated by reference into this rule: Section 004 incorporates "Products List of Evidential Breath Measurement Devices" into this rule.

**ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS:** For assistance on technical questions concerning the temporary and proposed rule, contact Matthew Gamette at (208) 884-7217.

Anyone may submit written comments regarding the proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before October 27, 2010.

DATED this 20th day of August, 2010.

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**IDAHO STATE POLICE**  
**Rules Governing Alcohol Testing**

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**Docket No. 11-0301-1001**  
**Temporary & Proposed Rule**

Colonel G. Jerry Russell, Director  
Idaho State Police  
700 S. Stratford Dr., Meridian, ID 83642  
(208) 884-7251/(208) 884-7295

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THE FOLLOWING IS THE TEMPORARY RULE & PROPOSED TEXT FOR DOCKET NO. 11-0301-1001

**000. LEGAL AUTHORITY.**

The Director of the Idaho State Police has general rulemaking authority to prescribe rules and regulations for alcohol testing pursuant to Section 67-2901, Idaho Code. (9-1-10)T

**001. TITLE AND SCOPE.**

01. Title. These rules shall be cited as IDAPA 11.03.01, "Rules Governing Alcohol Testing." (9-1-10)T

02. Scope. The rules relate to the governance and operation of the Alcohol Testing Program. (9-1-10)T

**002. WRITTEN INTERPRETATIONS.**

There are no written interpretations of this rule. (9-1-10)T

**003. ADMINISTRATIVE APPEALS.**

There is no provision for administrative appeals before the Idaho State Police under this chapter. (9-1-10)T

**004. INCORPORATION BY REFERENCE**

The following are incorporated by reference in this chapter of rules: (9-1-10)T

01. Conforming Products List of Evidential Breath Measurement Devices (revised 3/11/2010).  
This document is available on the internet at: <http://edocket.access.gpo.gov/2010/pdf/2010-5242.pdf>. (9-1-10)T

**005. MAILING ADDRESS AND OFFICE HOURS.**

The mailing address is Idaho State Police, Forensic Services, 700 S. Stratford Drive Suite 125, Meridian, ID 83642-6206. Lobby hours are Monday through Friday, 8 a.m. to 5:00 p.m. except holidays designated by the state of Idaho. (9-1-10)T

**006. PUBLIC RECORDS AVAILABILITY.**

This rule is subject to and in compliance with the Public Records Act. (9-1-10)T

**007. WEBSITE.**

Alcohol Testing information is available at: <http://www.isp.state.id.us/forensic/index.html>. (9-1-10)T

**008. – 009. (RESERVED).**

**0010. DEFINITIONS.**

01. **Alcohol.** "Alcohol" shall mean the chemical compound, ethyl alcohol. (7-1-93)

02. **Blood Alcohol Analysis.** "Blood alcohol analysis" shall mean an analysis of blood to determine the concentration of alcohol present. (7-1-93)

03. **Breath Alcohol Analysis.** "Breath alcohol analysis" shall mean an analysis of breath to determine the concentration of alcohol present. (7-1-93)

**IDAHO STATE POLICE  
Rules Governing Alcohol Testing****Docket No. 11-0301-1001  
Temporary & Proposed Rule**

04. Department. "Department" shall mean the Idaho State Police. (7-1-93)

05. Laboratory. "Laboratory" shall mean the place at which specialized devices, instruments and methods are used by trained personnel to measure the concentration of alcohol in samples of blood, ~~breath~~ or urine for law enforcement purposes. (7-1-93)(9-1-10)T

06. Proficiency Testing. "Proficiency testing" shall mean a periodic analysis of specimens whose alcohol content is unknown to the testing laboratory, to evaluate the capability of that laboratory to perform accurate analysis for alcohol concentration. (3-19-99)

07. Quality Control. "Quality control" shall mean an analysis of referenced samples whose alcohol content is known, which is performed with each batch of urine or blood analysis to ensure that the laboratory's determination of alcohol concentration is reproducible and accurate. (3-19-99)

08. Urine Alcohol Analysis. "Urine alcohol analysis" shall mean an analysis of urine to determine the concentration of alcohol present. (7-1-93)

~~005-010. (RESERVED)~~

**011. ABBREVIATIONS**

There are no abbreviations or acronyms in this chapter.

(9-1-10)T

**012. GENERAL PROVISIONS.**

01. Repeal of Prior Rules. All rules governing the Idaho State Forensic Laboratory are repealed, specifically Idaho State Police Emergency Rules 11.03.1, 11.03.2, 11.03.3, 11.03.4, 11.03.5 and 11.03.6. (7-1-93)

02. Continuation of Policies. All policies, training manuals, approvals of instruments, and/or certifications of officers in effect when the alcohol program was managed by the Department of Health and Welfare shall continue to be in effect in the Idaho State Police until the policy, training manual, approval and/or certification is changed or deleted by the Idaho State Police. (7-1-93)

**0123. REQUIREMENTS FOR LABORATORY ALCOHOL ANALYSIS.**

01. Laboratory. Any laboratory desiring to perform urine alcohol or blood alcohol analysis shall meet the following standards: (3-19-99)

a. The laboratory shall prepare and maintain a written procedure governing its method of analysis, including guidelines for quality control and proficiency testing; (7-1-93)

b. The laboratory shall provide adequate facilities and space for the procedure used; (7-1-93)

c. Specimens shall be maintained in a secure storage area prior to analysis; (7-1-93)

d. All equipment, reagents and glassware necessary for the performance of the chosen procedure shall be on hand or readily available on the laboratory premises; (7-1-93)

e. The laboratory shall participate in approved proficiency testing and pass this proficiency testing according to standards set by the department. Failure to pass a proficiency test shall result in disapproval until the problem is corrected and a proficiency test is successfully completed; (7-1-93)

f. For a laboratory performing blood or urine alcohol analysis, approval shall be awarded to the laboratory director or primary analyst responsible for that laboratory. The responsibility for the correct performance of tests in that laboratory rests with that person; however, the duty of performing such tests may be delegated to any person designated by such director or primary analyst; (3-19-99)

**IDAHO STATE POLICE**  
**Rules Governing Alcohol Testing**

**Docket No. 11-0301-1001**  
**Temporary & Proposed Rule**

g. Urine samples shall be collected in clean, dry containers. (7-1-93)

02. **Blood Collection.** Blood collection shall be accomplished according to the following requirements. (7-1-93)

a. Blood samples shall be collected using sterile, dry syringes and hypodermic needles, or other equipment of equivalent sterility; (7-1-93)

b. The skin at the area of puncture shall be cleansed thoroughly and disinfected with an aqueous solution of a nonvolatile antiseptic. Alcohol or phenolic solutions shall not be used as a skin antiseptic; (7-1-93)

c. Blood specimens shall contain ten (10) milligrams of sodium fluoride per cubic centimeter of blood plus an appropriate anticoagulant. (7-1-93)

03. **Results.** The results of analysis on blood for alcohol concentration shall be reported in units of grams of alcohol per one hundred (100) cubic centimeters of whole blood. (3-19-99)

04. **Reported.** The results of analysis on urine for alcohol concentration shall be reported in units of grams of alcohol per sixty-seven (67) milliliters of urine. Results of alcohol analysis of urine specimens shall be accompanied by a warning statement about the questionable value of urine alcohol results. (3-19-99)

05. **Records.** All records regarding proficiency tests, quality control and results shall be retained for three (3) years. (7-1-93)

**0134. REQUIREMENTS FOR PERFORMING BREATH ALCOHOL TESTING.**

01. **Instruments.** ~~Each breath testing instrument model shall either have been approved by the department or and shall be listed in the "Conforming Products List of Evidential Breath Measurement Devices" published in the Federal Register by the United States Department of Transportation, or appear in that list's successor whatever its current name may be as incorporated by reference in section 004 of this rule.~~ (7-1-93)(9-1-10)T

02. **Report.** Each direct breath testing instrument shall report alcohol concentration as grams of alcohol per two hundred ten (210) liters of breath. (7-1-93)

03. **Administration.** Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of analytical methods and standard operating procedures and training manuals. (3-19-99)(9-1-10)T

04. **Training.** Each individual operator shall demonstrate that he has sufficient training to operate the instrument correctly. This shall be accomplished by successfully completing a training course approved by the department. Officers must retrain periodically as required by the department. (7-1-93)

05. **Checks.** Each breath testing instrument shall be checked on a schedule established by the Department for accuracy with a simulator solution provided by or approved by the department or by a source approved by the department. These checks shall be performed according to a procedure established by the department. (3-19-99)(9-1-10)T

06. **Records.** All records regarding maintenance and results shall be retained for three (3) years. (3-19-99)

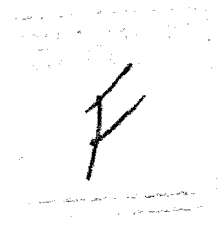
07. **Deficiencies.** Failure to meet any of the conditions listed in Sections 0123 and 0134. Any laboratory or breath testing instrument may be disapproved for failure to meet one (1) or more of the requirements listed in Sections 0123 and 0134, and approval may be withheld until the deficiency is corrected. (7-1-93)(9-1-10)T

0145. -- 999. (RESERVED).

DEC. 1. 2010 10:05AM

CL & FEENEY ATTY

NO. 5037 P. 32



**EXHIBIT C**

108

*Cover sheet submitted with Exhibit F*



## **Idaho Standard Operating Procedure**

### **Breath Alcohol Testing**

**Idaho State Police  
Forensic Services**

109

073

AGENCY RECORD

Idaho Breath Alcohol Standard Operating Procedure  
Issuing Authority--ISPFs Quality Manager  
Revision 0 Effective 8/20/2010  
Page 1 of 17

## Glossary

**Approved Vendor:** A source/provider/manufacturer of an approved premixed alcohol simulator solution shall be explicitly approved as a vendor of premixed alcohol simulator solutions for distribution within Idaho.

**Breath Alcohol Test:** A series of separate breath samples provided during a breath testing sequence.

**Breath Alcohol Testing Sequence:** A sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by either the instrument or the operator, but not both, and may consist of air blanks, performance verification, internal standard checks, and breath samples.

**Breath Testing Specialist (BTS):** An operator who has completed an advanced training class taught by an employee of the Idaho State Police Forensic Services. BTS certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Certificate of Analysis:** A certificate stating that the premixed ethyl alcohol solutions used for performance verification have been tested and approved for use by the ISPFS.

**Certificate of Approval:** A certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of an Idaho State Police Forensic Services Lab Manager, and the effective date of the instrument approval.

**Changeover Class:** A training class for currently certified personnel during which they are taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists attend BTS training that qualifies them to perform BTS duties related to the instrument.

**Evidentiary Test:** A breath test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and community service or training tests performed with the instrument.

**Idaho State Police Forensic Services (ISPFS):** Formerly known as the Bureau of Forensic Services, the ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS is the administrative body for the breath alcohol testing program per IDAPA 11.03.01.

**MIP/MIC:** An abbreviation used to designate minor in possession or minor in consumption of alcohol.

**Operator Certification:** The condition of having satisfied the training requirements for administering breath alcohol tests as established by the ISPFS. Operator certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Operator:** An individual certified by the ISPFS as qualified by training to administer breath alcohol tests.

**Operator Class:** An ISPFS-approved training class for prospective or uncertified breath alcohol operators. Currently certified Breath Testing Specialists may teach operator classes.

**Performance Verification:** A verification of the accuracy of the breath testing instrument utilizing a simulator and a performance verification solution. Performance verification should be reported to three decimal places. While ISPFS uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check."

**Performance Verification Solution:** A premixed ethyl alcohol solution used for field performance verifications. The solution is provided by and/or approved by ISPFS.

**Recertification Class:** A training class for currently certified personnel, completion of which results in uninterrupted continuation of their Operator or BTS status for an additional 26 months.

**Waiting Period/Monitoring Period/Deprivation Period/Observation Period:** 15-minute period prior to administering a breath alcohol test, in which an officer monitors the test subject/individual.

AGENCY RECORD

Idaho Breath Alcohol Standard Operating Procedure  
Issuing Authority---ISPFS Quality Manager  
Revision 0 Effective 8/20/2010  
Page 2 of 17

110  
074

## Breath Alcohol Standard Operating Procedure List of Revisions

<u>SOP Section</u>	<u>Topic</u>	<u>Date of Revision</u>
2	Delete reference to ALS	June 1, 1995
2	0.02/0.20 solutions	June 1, 1995
3.2.1	Valid breath tests	October 23, 1995
2.1	Alco-Sensor calibration checks	May 1, 1996
2.2	Intoxilyzer 5000 Calibration Checks Effective June, 1996	May 1, 1996
2.1.2	0.003 agreement	June 1, 1996
2.1.2	Operators may run calibration checks	July 1, 1996
2.1.2	Re-run a solution within 24 hours	September 6, 1996
2.1	All 3 solutions run within a 24-hour period	September 6, 1996
2	All 3 solutions run within a 24-hour period	September 6, 1996
2.1.2	Re-running of a solution	September 26, 1996
2.1	All solutions run within a 48-hour period Reference to "three" removed	September 26, 1996 Oct. 8, 1996
2	All 3 solutions run within a 48-hour period	September 26, 1996
2	More than three calibration solutions	October 8, 1996
2	Solution values no longer called in to BFS	April 1, 1997
2.1	Alco-Sensor and Intoxilyzer 5000 calibration check	August 1, 1998
2.2	Calibration checks for the Intoxilyzer 5000	February 11, 1999
	Name change, all references made to the Bureau of Forensic Services were changed to Idaho State Police Forensic Services.	August 1999
1.6	Record Management	August 1, 1999
2	Deleted sections on relocating, repairing, recalibrating, and loaning of instruments from previous revision.	August 1, 1999



1.2, 2.1, 2.2 3	Alco-Sensor and Intoxilyzer 5000 calibration checks Deleted sections on blood and urine samples for alcohol determination	August 1, 1999 August 1, 1999
1.6	Operator certification record management	January 29, 2001
1.2, and 3 2.1, 2.2	Reformat numbering Requirement for running 0.20 simulator solution	August 18, 2006
2.2.1.1.2.2	Changed 3-sample to "two print cards".	November 27, 2006
2.2.1.1.2.2 2.1.2.1 and 2.2.4	Deleted "simulator port" and "two print cards". Simulator temperature changed from "should" to "must".	May 14, 2007 May 14, 2007
2.2.1.1.2.2	Clarification of 0.20 calibration checks.	September 18, 2007
1.2	Added the Lifeloc FC20	February 13, 2008
1.5	Deleted requirement that the new instrument utilize the same technology if the BTS is currently certified	February 13, 2008
2	Modified the accepted range for simulator solutions to +/- 10%, eliminating the +/- 0.01 provision. Added "Established target values may be different from those shown on the bottle label"	February 13, 2008
2.2	Added Lifeloc FC20 calibration checks Intoxilyzer 5000 calibration is now section 2.3	February 13, 2008
2.	Modified to specifically allow use of the 0.20 during subject testing	February 13, 2008
Sections 1, 2, 3	General reformat for clarification. Combined Alcosensor and Lifeloc sections. Specifically, changed calibration requirement using the 0.20 reference solution from four (4) checks to two (2).	December 1, 2008
2.1.4, 2.2.3, 2.2.4, 2.2.5 And 2.2.10	Clarification: a "calibration check" consists of a pair of samples in sequence and both samples must be within the acceptable range before proceeding with subject testing. A 0.20 solution should be replaced every 20-25 samples. Clarified the correct procedure for performing a calibration check.	January 14, 2009
2.1.3, 2.1.4.1, 2.1.9	Clarification: Added " <i>before and after</i> " to the 0.080 and 0.200 calibration checks, within 24 hours of a subject test. The official time and date of the calibration check is the time and date recorded on the printout, <i>or the time and date recorded in the log, whichever corresponds to the calibration check referenced in section 2.1.3 or 2.1.4.1.</i>	July 7, 2009

## History Page

Revision #	Effective date	History
0	8/20/2010	The entire SOP was rewritten to incorporate language changes regarding performance verifications, and to clear-up ambiguities associated with the 0.20 verification and the relevance to cases not involving an 18-8004c charge. Scope and safety sections were added. Troubleshooting, MIP/MIC sections added.

113

077

AGENCY RECORD

## Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments

### Contents:

<u>Section 2: Scope</u>	page 7
<u>Section 3: Safety</u>	page 7
<u>Section 4: Instrument and Operator Certification</u>	page 7
<u>Section 5: Performance Verification of Approved Breath Testing Instruments</u>	page 10
<u>Section 6: Evidentiary Testing Procedure</u>	page 13
<u>Section 7: Troubleshooting</u>	page 15
<u>Section 8: MIP/MIC Procedure</u>	page 16

114

AGENCY RECORD

078

# **1      *Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments.***

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## **2      Scope**

This method describes the Idaho State Police Forensic Services (ISPFS) procedure, for use by agencies external to ISPFS, for the analysis of breath for the presence of volatile compounds using an approved breath testing instrument. This method provides for the quantitative analysis of ethanol.

Following all the recommendations of this external procedure will establish the scientific validity and set the unquestioned foundational admissibility of the breath alcohol test. Failure to meet all of the recommendations within this procedure does not disqualify the breath alcohol test, but does allow for the questioning of the breath alcohol tests as it pertains to its foundation of admissibility in court. That foundation can be set, through testimony, by a breath testing specialist expert or ISPFS expert in breath testing as to the potential ramifications of the deviation from the procedure as stated.

## **3      Safety**

Within the discipline of breath alcohol testing, the general biohazard safety precautions should be followed. This is due to the potential infectious materials that may be ejected from the mouth during the sampling of the breath. Caution should be taken so as the expired breath is not directed towards the officer or other unrelated bystander.

## **4      Instrument and Operator Certification**

To ensure that minimum standards are met, individual breath testing instruments, operators, and breath testing specialists (BTS) must be approved and certified by the Idaho State Police Forensic Services (ISPFS). The ISPFS will establish and maintain a list of approved instruments by manufacturer brand or model designation for use in the state.

- 4.1 **Approval of Breath Testing Instruments.** In order to be approved and certified each instrument must meet the following criteria:
- 4.1.1 The instrument shall analyze a reference sample or analytical test standard, the results of which must agree within +/- 10% of the target value or such limits set by ISPFS.
  - 4.1.2 The certification procedures shall be adequate and appropriate for the analyses of breath specimens for the determination of alcohol concentration for law enforcement.
  - 4.1.3 Any other tests deemed necessary to correctly and adequately evaluate the instrument to give accurate results in routine breath alcohol testing.
- 4.2 The ISPFS may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof.
- 4.3 **Operators** become certified by completing a training class taught by an ISPFS certified Breath Testing Specialist (BTS). Certification is for 26 calendar months and expires the last day of the 26th month. Certification will allow the operator to perform all functions required to obtain a valid breath alcohol test. It is the responsibility of the individual operator to maintain their current certification; the ISPFS will not notify operators that their certification is about to expire.
- 4.3.1 Recertification for another 26-month period is achieved by completing an ISPFS approved Operator class prior to the end of the 26th month.
  - 4.3.2 If the individual fails to satisfactorily complete the class (including the written and practical tests), or allows their certification status to expire, he/she must retake the operator class in order to become re-certified.
  - 4.3.3 If current Operator certification is voided, the individual is not certified to run evidentiary breath alcohol tests on the instrument in question until the operator class is completed.
    - 4.3.3.1 There are no grace periods or provisions for extension of operator certification.
- 4.4 **Breath Testing Specialists (BTS)** are Operators who have completed an advanced training class and are ISPFS-certified to perform instrument maintenance, and provide both initial and recertification training for instrument operators.
- 4.4.1 To obtain initial BTS certification, an individual must be currently certified as an Operator of that particular instrument. BTS certification is then obtained by completing an approved BTS training class.
  - 4.4.2 Certification is valid for 26 calendar months.

- 4.4.3 If BTS certification is allowed to expire, the individual reverts to certified Operator status for 12 calendar months for that instrument. He/she may no longer perform any BTS specific duties relating to that particular instrument.
- 4.4.4 BTS certification is renewable by attending an approved BTS training class.
- 4.4.5 The Idaho State Police Forensic Services may revoke BTS certification for cause. Examples may include falsification of records, failure to perform required performance verification, failure to successfully pass a BTS re-certification class and failure to meet standards in conducting operator training.
- 4.5 **Adoption of a new instrument** by an agency will require updating any BTS and Operators in that agency in the use of the new instrument.
  - 4.5.1 A currently certified BTS may become a certified BTS for a new instrument by completing an ISPFS approved BTS Instrumentation class.
  - 4.5.2 A currently certified **Operator** may certify on a new instrument by completing an ISPFS approved Operator Instrumentation Class for the new instrument.
  - 4.5.3 Individuals not currently certified as **Operators** must complete an Operator Class for each approved instrument.
- 4.6 **Record maintenance and management.** It is the responsibility of each individual agency to store performance verification records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of operator certification.
  - 4.6.1 It is the responsibility of the agency to see that the said records are stored and maintained a minimum of (3) years in accordance with IDAPA 11.03.01.
    - 4.6.1.1 Records may be subject to periodic review by the Idaho State Police Forensic Services.
  - 4.6.2 The Idaho State Police Forensic Services will not be responsible for the storage of such records not generated by ISPFS.

## 5. Performance Verification of Breath Testing Instruments

Performance verifications aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning correctly. Performance verifications are performed using a wet bath simulator performance verification solution. The solution is provided by and/or approved by ISPFS. The ISPFS analysis establishes the target value and acceptable range of the solutions used for the verification and includes the acceptable values on the Certificate of Analysis for each solution. Note: The ISP established target values may be different from those shown on the bottle label.

### 5.1 Alco-Sensor and Lifeloc FC20 – Portable Breath Testing Instrument Performance Verification

5.1.1 The Alco-Sensor and Lifeloc FC20 portable breath testing instrument performance verification is run using approximately 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.

5.1.2 The performance verification using the 0.08 and 0.20 performance verification solutions consist of two samples separated by air blanks.

5.1.3 A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 performance verification solution must be performed within 24 hours, before or after an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification.

5.1.3.1 A 0.08 performance verification solution should be replaced with fresh solution approximately every 25 verifications or every calendar month, whichever comes first.

5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications.

**NOTE:** The 0.020 performance verification was implemented for the sole purpose of supporting the instruments results for an 18-8004c charge. In the absence of an 18-8004c charge, the 0.20 verifications, or lack thereof, shall have no relevance to the results or the evidentiary value of the evidentiary test.

5.1.4.1 The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after an evidentiary test. The 0.20 performance verification solution should not be used routinely for this purpose.

- 5.1.5 Acceptable results for a 0.080 or 0.20 performance verification is a pair of samples in sequence that are both within  $\pm 10\%$  of the performance verification solution target value. Target values and ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFS.

**NOTE:** Due to external factors associated with changing a performance verification solution (examples include: ambient air in the sample chamber, temperature fluctuation) the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three runs for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. The suggested troubleshooting procedure should be followed if the initial performance verification does not meet the acceptance criteria.

- 5.1.6 Temperature of the simulator must be between  $33.5^{\circ}\text{C}$  and  $34.5^{\circ}\text{C}$  in order for the performance verification results to be valid.

**NOTE:** The simulator may need to warm for approximately 15 minutes to insure that the metal lid is also warm. If the lid is cold, condensation of alcohol vapor may occur producing low results.

- 5.1.7 Performance verification solutions should only be used prior to the expiration date on the label.
- 5.1.8 An agency may run additional performance verification solution levels at their discretion.
- 5.1.9 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log, whichever corresponds to the performance verification referenced in section 5.1.3 or 5.1.4.1.

## 5.2 Intoxilyzer 5000/EN Performance Verification

Intoxilyzer 5000/EN instruments must have a performance verification with each evidentiary test. If the performance verification is within the acceptable range for the lot of solution being used, then the instrument will be approved and the resulting breath samples will be deemed valid for evidentiary use.

- 5.2.1 Intoxilyzer 5000/EN performance verification is run using 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.



- 5.2.2 During each evidentiary breath alcohol test using the Intoxilyzer 5000/EN, a performance verification will be performed as directed by the instrument testing sequence and recorded as SIM CHK on the printout. If the SIM CHK is not within the acceptable range for the solution lot being used, the testing sequence will abort and no breath samples will be obtained.
- 5.2.3 A two sample performance verification using a **0.08 performance verification solution** should be run and results logged each time a solution is replaced with fresh solution. A 0.08 performance verification solution should be replaced with fresh solution approximately every 100 samples or every calendar month, whichever comes first.
- 5.2.4 A two sample performance verification using a **0.20 performance verification solution** should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 samples. The same bottle of 0.20 solution may be used for several months.

**NOTE:** The 0.020 performance verification was implemented for the sole purpose of supporting the instruments results for a 18-8004c charge. In the absence of an 18-8004c charge, the 0.20 verification, or lack thereof, shall have no relevance to the results or the evidentiary value of the evidentiary test.

- 5.2.5 Acceptable results for a 0.080 or 0.20 performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results for each solution lot series are included in a certificate of analysis, prepared by, and available from, the ISPFS.

**NOTE:** Due to external factors associated with changing a performance verification solution (examples include: ambient air in the sample chamber, temperature fluctuation) the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained however, if results after a total of three runs for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. Follow the suggested troubleshooting procedure if the initial performance verification does not meet the acceptance criteria.

120

- 5.2.6 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log.

- 5.2.7 Performance verification solutions should only be used prior to the expiration date as marked on the label.
- 5.2.8 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the performance verification results to be valid.
- 5.2.9 An agency may run additional performance verification solution levels at their discretion.
- 5.2.10 The BTS must set the correct acceptable range limits and performance verification solution lot number in the instrument before proceeding with evidentiary testing.

## 6. Evidentiary Testing Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

- 6.1 Prior to evidential breath alcohol testing, the subject/individual should be monitored for at least fifteen (15) minutes. Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the start of the 15 minute waiting period. During the monitoring period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate.

NOTE: If a foreign object/material is left in the mouth during the entirety of the 15 minute monitoring period, any potential external alcohol contamination will come into equilibrium with the subject/individual's body water and/or dissipate so as not to interfere with the results of the subsequent breath alcohol test.

- 6.1.1 The breath alcohol test must be administered by an operator currently certified in the use of the instrument used.
- 6.1.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.
- 6.1.3 The operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.
- 6.1.4 During the monitoring period, the operator must be alert for any event that might influence the accuracy of the breath alcohol test.
  - 6.1.4.1 The operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the operator should begin another 15-minute waiting period before repeating the testing sequence.

6.1.4.2 If, during the 15-minute waiting period, the subject/individual vomits or regurgitates material from the stomach into the subject/individual's breath pathway, the 15-minute waiting period must begin again.

6.1.4.3 If there is doubt as to the events occurring during the 15 minute monitoring period, the officer should look at results of the duplicate breath samples for evidence of potential alcohol contamination. For clarification see section 6.2.2.2.

**6.2 A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes apart to allow for the dissipation of potential mouth alcohol contamination.**

NOTE: A deficient or insufficient sample does not automatically invalidate a test sample.

6.2.1 If the subject/individual fails or refuses to provide a second or third adequate sample as requested by the operator, the single test result may be considered **valid**.

6.2.1.1 The operator may repeat the testing sequence as required by circumstances.

6.2.1.2 The operator should use a **new mouthpiece** for each series of tests.

6.2.2 A third breath sample is required if the first two results differ by more than 0.02.

6.2.2.1 Unless mouth alcohol is indicated or suspected, it is **not** necessary to repeat the 15-minute waiting period to obtain a third breath sample.

6.2.2.2 The results for a duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individual's breath pathway, show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

6.2.3 The operator should log test results and retain printouts for possible use in court. The log of the results or the instrument printouts can be used as the official legal record for court purposes.

6.2.4 If a subject/individual fails or refuses to provide a second or third sample as requested by the operator, the results obtained are still considered valid

by the ISPFS, **provided** the failure to supply the requested samples was the fault of the subject/individual and not the operator.

- 6.2.5 If the second or third samples are lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.

## 7. Troubleshooting Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

- 7.1 Performance verification: If, when performing the periodic performance verification, the instrument falls outside the limits of the verification, the troubleshooting guide should be used.

NOTE: This is a guide for troubleshooting failed performance verifications and the procedure is recommended to streamline and isolate the potential cause of the problem. Strict adherence to the guidelines is not required.

- 7.1.1 The three sources of error when performing the periodic performance verifications are in the simulator setup and operator technique, the simulator performance verification solution, and the instrument calibration itself.

- 7.1.2 If the first performance verification fails, the simulator setup and technique of the operator performing the verification should be evaluated. The simulator should be evaluated to ensure that it is hooked up properly, uses short hoses, is properly warmed, is within temperature, the operator blow technique is not too hard or soft, and that the operator does not stop blowing until after the sample is taken.

- 7.1.2.1 The performance verification should be run a second time

- 7.1.2.2 If the performance verification passes on the second try, the instrument passes the performance verification.

- 7.1.3 If the second performance verification fails, then the performance verification solution should be evaluated.

- 7.1.3.1 The performance verification solution should be changed to a fresh solution.

- 7.1.3.2 The solution should be warmed for approximately 15 minutes, or until the temperature is within range, and the simulator lid is as warm as the simulator jar.

7.1.3.3 The performance verification may then be repeated.

7.1.4 If the third performance verification fails, then the only remaining source of error lies with the instrument itself. At this point the instrument must be taken out of service and sent to ISPFS or an approved service provider.

7.1.5 Upon return from service, the instrument should be evaluated by ISPFS before being put back into service.

**7.2 Thermometers:**

7.2.1 If a bubble forms in the thermometer, the operator or BTS can place the thermometer in a freezer to draw the mercury (or equivalent) into the bulb of the thermometer. This should disperse the bubble.

## **8. MIP/MIC Procedure**

Since the testing threshold (presence or absence) for a minor in possession/minor in consumption charge is different from an 18-8004 charge and the numeric thresholds, there is a different procedure associated with these special circumstances. In many instances, an underage drinking party may consist of multiple subjects/individuals that need to be tested and the sheer number of individuals does not lend itself to observing a 15 minute waiting period for each person. The potential for "mouth alcohol" is still a factor and should be addressed in the testing sequence.

**8.1 15 minute observation period:** At the officer's discretion, or as the circumstances dictate, the regular DUI procedure (Section 6) may be followed in order to obtain a breath sample from the subject/individual. Otherwise, a shortened procedure can be followed

**8.2 MIP/MIC procedure:**

8.2.1 The breath alcohol test must be administered by an operator currently certified in the use of the instrument used.

8.2.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.

**8.3 A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples should be approximately 2 minutes apart to allow for the dissipation of potential mouth alcohol contamination.**

124

NOTE: A deficient or insufficient sample does not automatically invalidate a test sample.

- 8.3.1 If the subject/individual fails or refuses to provide a second or third adequate sample as requested by the operator, the single test result may be considered **valid**.
- 8.3.1.1 The operator may repeat the testing sequence as required by circumstances.
- 8.3.1.2 The operator should use a **new mouthpiece** for each series of tests.
- 8.3.2 A third breath sample is required if the first two results differ by more than 0.02.
- 8.3.2.1 The results for a duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individuals breath pathway, show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.
- 8.3.3 The operator should log test results and retain printouts for possible use in court. The log of the results or the instrument printouts can be used as the official legal record for court purposes.
- 8.3.4 If a subject/individual fails or refuses to provide a second or third sample as requested by the operator, the results obtained are still considered valid by the ISPFS, **provided** the failure to supply the requested samples was the fault of the subject/individual and not the operator.
- 8.3.5 If the second or third samples are lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.

## 8. MIP/MIC Procedure

The previous version of this section has been withdrawn from publication and will be replaced by an updated version that is pending statutory and legal review. Please disregard and destroy any copies of the previous version of this section.

126

EXHIBIT  
G

~~EXHIBIT D~~

127

*Cover sheet submitted with Exhibit G*

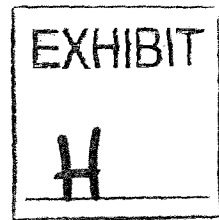


## History Page

Revision #	Effective date	History
0	8/20/2010	The entire SOP was rewritten to incorporate language changes regarding performance verifications, and to clear-up ambiguities associated with the 0.20 verification and the relevance to cases not involving an 18-8004C charge. Scope and safety sections were added. Troubleshooting, MIP/MIC sections added.
1	8/27/2010	Deletions and/or additions to sections 2, 4.3.3, 4.4.1, 4.4.3, 4.4.5, 4.6.1.1, 5.1.2, 5.1.4, 5.1.4.1, 5.1.5, 5.2.4, 5.2.5, 6, 6.2.1, 6.2.3, 6.2.4, 7, 7.1, 7.1.1, 7.1.2, 7.1.2.2, 7.1.3, 7.1.4, 7.1.5, 8.

128

IN THE IDAHO TRANSPORTATION DEPARTMENT  
STATE OF IDAHO

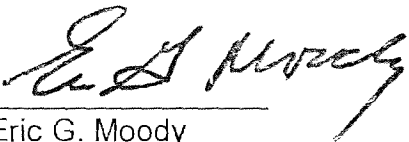


In the Matter of the	)	D.L. No. JA363481B
Driving Privileges of	)	FILE No. 648000035832
GEORGE JACOB BEYER JR	)	STAY
	)	ORDER
_____	)	

Pursuant to Title 67, Idaho Code, and IDAPA rule 04.11.01 the Idaho Transportation Department is hereby ordered to stay George Jacob Beyer Jr Idaho Code §18-8002A suspension effective the 2<sup>nd</sup> day of December 2010. The suspension shall be stayed indefinitely pending the administrative hearing and the written Findings of Fact and Conclusions of Law and Order. The petitioner is advised that the suspension shall be effective, unless otherwise ordered by the hearing examiner, and shall run for a period of 90 days from said date.

This stay shall not set precedent for stays in future Administrative License Suspension Hearings.

DATED this 2<sup>nd</sup> day of December 2010.

  
Eric G. Moody  
Hearing Examiner

RON T. BLEWETT  
WILLIAM JEREMY CARR  
PAUL THOMAS CLARK  
JENNIFER B. DOUGLASS  
THOMAS W. FEENEY  
SCOTT D. GALLINA \*\*  
JONATHAN D. HALLY  
RUBE G. JONES \*\*  
TINA L. KERNAN \*\*  
JOHN C. MITCHELL  
DOUGLAS L. MUSHLITZ  
CHARLES M. STROSCHEIN \*\*  
CONNIE TAYLOR \*\*

LAW OFFICES OF  
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P.O. DRAWER 285  
LEWISTON, IDAHO 83501

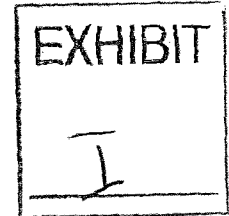
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\* LICENSED IN WASHINGTON & OREGON ONLY  
\*\* LICENSED IN IDAHO & WASHINGTON

December 2, 2010

VIA FACSIMILE ONLY TO: (208) 332-2002

Eric Moody  
Idaho Transportation Department  
Driver Services Section  
PO Box 7129  
Boise, Idaho 83707-1129



RE: GEORGE LAY DEXTER, JR.  
SS/DL#: [REDACTED]  
ARRESTED: November 6, 2010

Dear Mr. Moody:

With this fax please find the information that was noted during the hearing, the POST employee profile. Also please find a copy of State of Washington v. Fausto and Ballow. This is a compelling case from the State of Washington, in which the Washington panel of judges notes that without a disclosure of the confidence interval, due process is violated because the science of breath testing requires a confidence interval and without it the breath test results are not reliable. The State of Idaho has no such standard and without it the scientific requirements of breath testing are not met.

The hearing officer only has to look at the confidence interval that is noted in blood test results in the State of Idaho to realize the need for the same in a breath test. The decision of the judges from the district court in the State of Washington is compelling and the State of Idaho should be embarrassed based on its lack of standards and lack of scientific testing and peer review for the current state of Idaho's breath testing system. It does no one any good to simply dumb down the system for the sake of administrative license suspension matters and DUI prosecutions.

Thank you.

Sincerely,

CLARK and FEENEY

Charles M. Stroschein

AGENCY RECORD  
CMS:cw  
Enclosures

130

094

NOV 19 2010 02:11 PM	Idaho POST Academy Employee Profile	Page: 1
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EXHIBIT

J

Talbott, Jeffory R.

## Certification

Level	Date	Status	Cert #	Certified	Expires	Probation
Basic	2-06-2006	Active		2-06-2006		

## Training

Course	Title	Date	Hours	Score	Status
230H	BLOCK TRAINING	9-15-2010	8.00	0.00	Passed
103B	BREATH TESTING SPECIALIST	8-27-2010	8.00	0.00	Passed
103B	BREATH TESTING SPECIALIST	8-26-2010	8.00	0.00	Passed
154	MDT TRAINING	7-31-2010	2.00	0.00	Passed
124	EVOC	7-21-2010	4.00	0.00	Passed
144C	EMOTIONAL SURVIVAL SKILLS FOR LE	5-07-2010	8.00	0.00	Passed
135A	INTOX RECERTIFICATION	1-25-2010	2.50	1.00	Instructed
135	INTOXILYZER 5000	1-17-2010	2.50	1.00	Instructed
121C	DUI/SFST REFRESHER	1-15-2010	16.00	0.00	Passed
2010 Pass/Complete:			54.00	Instructed:	5.00
203	CRASH INVESTIGATION (M-4)	11-16-2009	4.00	0.00	Passed
130	HAZARDOUS MATERIALS	10-26-2009	2.00	0.00	Passed
135	INTOXILYZER 5000	5-10-2009	3.00	1.00	Instructed
230I	COMMERCIAL VEHICLE INSPECTIONS	4-17-2009	40.00	0.00	Passed
103	ALCO-SENSOR III/LIFELOC FC20	2-15-2009	3.00	1.00	Instructed
2009 Pass/Complete:			46.00	Instructed:	6.00
245A	SPEED MEASUREMENT REQUALIFICATION	12-07-2008	4.00	0.00	Passed
103	ALCO-SENSOR III/LIFELOC FC20	11-25-2008	2.00	1.00	Instructed
103B	BREATH TESTING SPECIALIST	11-17-2008	4.00	1.00	Instructed
135	INTOXILYZER 5000	11-09-2008	3.00	1.00	Instructed
103	ALCO-SENSOR III/LIFELOC FC20	11-09-2008	4.00	1.00	Instructed
103	ALCO-SENSOR III/LIFELOC FC20	11-06-2008	4.00	1.00	Instructed
127B	FIREARMS SAFETY & TACTICAL USE	11-05-2008	2.00	0.00	Passed
252A	INCIDENT COMMAND: FIRST RESPONDER	10-27-2008	3.00	0.00	Passed
135	INTOXILYZER 5000	10-10-2008	8.00	0.00	Passed
103	ALCO-SENSOR III/LIFELOC FC20	10-09-2008	8.00	0.00	Passed
111J	RESPECTFUL WORKPLACE	9-23-2008	4.00	0.00	Passed
229A	ISP IN-SERVICE TRAINING	6-11-2008	12.00	0.00	Passed
203	CRASH INVESTIGATION (M-4)	4-11-2008	80.00	0.00	Passed
2008 Pass/Complete:			121.00	Instructed:	17.00
106G	REACTIVE IMPACT WEAPONS RE-CERT.	4-07-2006	4.00	0.00	Passed
161A	USE OF FORCE	4-07-2006	3.00	0.00	Passed
270	TACTICAL TEAM OPERA/ACTIVE SHOOTER/SIMUN	4-04-2006	10.00	0.00	Passed

131

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Idaho POST Academy  
Employee Profile

Page 2

## Talbot, Jeffery R.

FTO	FIELD TRAINING MANUAL	2-06-2006	40.00	0.00	Passed
		2006 Pass/Complete:	57.00		
229	ISP ADVANCED TRAINING	9-09-2005	646.00	0.00	Passed
252A	INCIDENT COMMAND: FIRST RESPONDER	8-22-2005	8.00	0.00	Passed
150	BASIC POLICE ACADEMY	6-10-2005	533.00	0.00	Passed
150	BASIC POLICE ACADEMY	6-10-2005	48.00	0.00	Passed
139	OFFICER SURVIVAL/POLICE MARRIAGE	6-09-2005	3.00	0.00	Passed
		2005 Pass/Complete:	1,238.00		
		Total Pass/Complete:	1,516.00	Instructed:	28.00

132

## IN THE DISTRICT COURT OF KING COUNTY FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

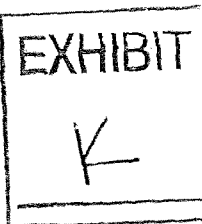
Plaintiff,

vs.

FAUSTO, LESLIE PERPUSE, and  
BALLOW, BRETT RICHARD,

Defendants.

Case No. C076949 and 9Y6231062

ORDER SUPPRESSING DEFENDANT'S  
BREATH-ALCOHOL MEASUREMENTS IN  
THE ABSENCE OF A MEASUREMENT  
FOR UNCERTAINTY

In the two Driving Under the Influence (DUI) cases herein, Defendants request suppression of their breath test results under E702, ER 403 and ER 901. Defendants argue that, because the Washington State Toxicology Laboratory Division<sup>1</sup> (WTLD) is reasonably able to produce a breath test reading with a corresponding measure of the reliability of the reading, their breath test readings should not be admitted without such a corresponding measurement. The State counters that issues of reliability are not foundational by statute, WTLD protocols or current forensic practices, and are not required by the rules of evidence. Testimony was taken August 2<sup>nd</sup> through August 6th, 2010. The State was represented by Ms. Margaret E. Nave and Mr. Moses Garcia. The defendants were represented by Mr. Ted Vosk, Ms. Andrea Roberts and Mr. Kevin Trombold.

For the reasons stated below, we hold that historic standards of justice - contained in the federal constitution, case authority and court rules - require that the State present breath test readings, both in pretrial discovery and at trial, showing their true value, rather than wrapped in such a way that a false picture is presented, either to the defendant or to the trier of fact.

<sup>1</sup> The WTLD was known as the Washington State Toxicology Laboratory at the time of the Abmach decision. As a part of the office's reorganization, it is now known as the Washington State Toxicology Laboratory Division. To avoid confusion, this decision will refer to the lab, both historically and in the present, as the WTLD.

**CLARK and FEENEY**

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LEWISTON, IDAHO 83501

TELEPHONE: (208) 743-9516  
FAX: (208) 746-9160

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**FAX COVER SHEET**

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DATE: December 2, 2010  
FROM: CHARLES M. STROSCHEIN  
TO: ERIC G. MOODY  
IDAHO TRANSPORTATION DEPT  
FAX NO. (208) 332-2002  
RE: George J. Beyer

Please see attached.

TOTAL NO OF PAGES (INCLUDING THIS COVER PAGE): 35

For missing or illegible pages please telephone (208)743-9516, and speak to: CHARITY

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134

AGENCY RECORD

098

## Findings of Fact

### I. Definitions and Explanations

Because the subject matter of this opinion is so heavily steeped in scientific principals and procedures which are largely unknown to the Judiciary and the Bar, the Court is including in the Findings explanations and definitions of many of the principals involved.

#### A. Contributors to Uncertainty – no measurement is consistently accurate.

1. *Instrument bias*, otherwise known as systemic error, is the tendency of an instrument to consistently incorrectly report the true value of a measured item, the measurand. It is associated with the lack of accuracy of a measurement.
2. *Biological/Sampling*, is the single greatest contributor to uncertainty. The variables contributing to biological/sampling error include: breathing patterns; breath temperature; breath volume and breath flow rate.
3. *Traceability*, concerns the relating of a measurement result to stated references through an unbroken chain of comparisons, all with stated uncertainties.
4. *BAC Simulator*, the device associated with a breath test instrument, is used as a calibration device. Each simulator device and solution may introduce error through traceability, and through their temperature regulating systems, thermometers and attached tubing.
5. *Instrument/Analytical*, is the error associated directly with the BAC Datamaster, but also includes operator (trooper, officer or deputy) error. Instrument error includes errors related to optics (infrared spectrometry), electronics, software, tubing, and temperature.

#### B. Instrument Bias

1. All measuring instruments have bias associated with them.
2. Therefore, all values reported by an instrument are artificially elevated or depressed by instrument bias.



- 1 3. Methods of determining instrument bias are commonly used and accepted in the  
2 scientific community.
- 3 4. Generally accepted scientific protocols usually require calibration of instruments. This  
4 process compares the reference standard (a known) with the instrument measurement  
5 results, thus revealing the machine bias.
- 6 5. After the determination of instrument bias, corrections can be made using algebraic  
7 formulas.
- 8 6. If measurement results are not corrected for instrument bias, instrument bias results in  
9 greater error in any given measurement.
- 10 7. It is generally accepted in the scientific community that all reported instrument results  
11 will be corrected for bias. Yet, this practice is not generally followed in the forensic  
12 science community.

13 C. Measurement uncertainty – confidence intervals

- 14 1. Every measurement is “uncertain,” in that no instrument is infinitely precise and  
15 accurate. No matter how good the instrument or the methodology, one can never  
16 know for sure the actual value of the thing being measured.
- 17 2. Bias is part of that uncertainty, as is the lack of precision of the instrument.
- 18 3. For any instrument there are an infinite number of values dispersed within a range  
19 around the value obtained by the instrument that are consistent with measured value,  
20 and that with varying degrees of credibility can be attributed to the true value of the  
21 thing being measured.
- 22 4. Even the best instruments yield only an estimate of the true value.
- 23 5. An uncertainty measurement is a qualitative statement characterizing the dispersion  
24 (range) of values that can be actually and reasonable attributed to the measurement.
- 25 6. This range of values associated with a measurement and the level of confidence  
associated with that range are known as measurement uncertainty. There are many  
methods calculating and showing uncertainty. One such method, now adopted by the  
WTLD is a confidence interval.

- 1 7. Because every measurement result actually represents a range of values, a  
2 measurement is more accurate if it is accompanied by a quantitative estimate of its  
3 uncertainty.  
4 8. All important sources of uncertainty must be taken into account in an effort to  
5 increase the level of confidence to the highest level. Measurement uncertainty does  
6 not include mistakes, and assumes no errors.

7 D. Fitness for Purpose

8 An instrument is considered "fit for purpose," or a method is "fit for purpose," if it is  
9 appropriate for use in testing the specimen.

10 E. Quality Assurance

11 Quality assurance involves the practices and procedures used on an instrument to  
12 determine if it is operating in a proper manner. Quality assurance includes operating  
13 instructions, calibration and maintenance.

14 F. Quality Assurance Procedure

15 A procedure which checks the critical components within each breath test instrument on  
16 at least a yearly basis.

17 G. Measurement Uncertainty

18 Measurement uncertainty focuses on the test results. Measurement uncertainty assumes  
19 the fitness for purpose of the measuring device. Measurement uncertainty also assumes  
20 appropriate quality assurance practices for the processes. Measurement uncertainty  
21 defines how accurate the measurement actually is and aids in its interpretation.

22 **II. Measurement Standards Adopted Within the Scientific and Forensic Communities**

23 A. The International Organization for Standardization

24 There are several organizations that establish standards for laboratory work. The leading  
25 organization is The International Organization for Standardization (ISO). They do not  
accredit or inspect laboratories, merely set standards for the work. National organizations  
do the inspections necessary for certification or accreditation.

137

1 B. ISO 17025

2 ISO has created ISO 17025 – General Requirements for the Competence of Testing and  
3 Calibration Laboratories. This has been accepted by the Washington Toxicology  
4 Laboratory as the standard for their accreditation and work.

5 C. ASCLD/LAB

6 The American Society of Crime Laboratory Directors/Laboratory Accreditation Board  
7 (ASCLD/LAB) uses ISO 17025 as the standard when doing accreditation reviews. The  
8 Washington Toxicology Laboratory Division (WTLD) received accreditation from  
9 ASCLD/LAB November 16, 2009 for its calibration program. No accreditation has been  
sought, nor is it available for the breath testing program.

10 D. NIST; EURACHEM; A2LA and NATA

11 There are other national and international organizations which establish standards for  
12 laboratories. Examples are National Institute for Standards and Testing (NIST),  
13 EURACHEM, American Association of Laboratory Analysts (A2LA), and National  
14 Association of Toxicology Analyst (NATA).

15 E. Standards

16 Each of the organizations mentioned above have established or adopted standards which  
17 require the assessment and reporting of uncertainty of measurement with a test result.

18 F. Uncertainty

19 It is well accepted in the scientific community that testing laboratories will use  
procedures for estimating uncertainty of measurement whenever possible.

20 G. Uncertainty and Test Reports

21 It is well accepted within the scientific community that a statement on the estimated  
22 uncertainty of measurement is needed for a test reports when it is relevant to the validity  
23 or application of the test result, or when the uncertainty affects compliance to a specific  
24 standard. A decision not to calculate uncertainty is not appropriate under generally  
accepted scientific principles.

25 H. Uncertainty is Essential to Proper Test Result Interpretation

1 Knowledge of the uncertainty associated with measurement results is essential to the  
2 proper interpretation of the results. Without quantitative assessment of uncertainty it is  
3 impossible to determine if statutory minimum limits have been exceeded. It is generally  
4 accepted within the scientific community that:

- 5 1. All results from every forensic test made should indicate the uncertainty in the  
6 measurements that are made.
- 7 2. Forensic reports, and any courtroom testimony stemming from them, must include the  
8 limitations of the analysis, including probabilities where possible.
- 9 3. Calculations of uncertainty can be done in many ways, including spreadsheet, tables  
10 or charts, calculators and manually. Calculations of uncertainty require an ability to  
11 calculate algebraic algorithms, but not advanced math skill.

#### 12 I. WTLD Controls the Method of Determining Uncertainty

13 There are many methods of estimating the uncertainty which are recognized within the  
14 scientific community. WTLD uses a confidence interval system developed by Rod  
15 Gullberg. The particular method chosen to determine uncertainty lies entirely within the  
16 purview of the WTLD and any appropriate accrediting organization.

### 17 III. Bias or Systemic Error as Applied to the BAC Datamaster

#### 18 A. Systemic Error

19 The field of forensic breath testing recognizes that there is some bias associated with  
20 every breath test instrument, and every breath test.

- 21 1. Bias does not automatically disqualify a machine or breath test. Rather, bias or  
22 systemic error must be determined and the results corrected for the bias.
- 23 2. Due to systemic error, the value reported by a Datamaster test is artificially high (or  
24 low) as compared with the true value of the breath test.
- 25 3. The failure to correct for bias leads to the reporting of a value known to be in error.

- 1 4. To correct the error, the bias value must be added to (or subtracted from) the
- 2 indicated result.
- 3 5. The bias of a BAC Datamaster is determined at the time of the QAP. The results are
- 4 not corrected for this unless a specific request is made by a defense attorney or
- 5 defendant. This bias calculation is reported as a percentage on the QAP worksheet.
- 6 6. For a particular value,  $Y$ , indicated by a Datamaster, the bias corrected BAC is
- 7 determined by the following algorithm:

$$BAC = \frac{Y}{(1 + (b \times 0.01))}$$

- 10 7. The Datamaster can be programmed to calculate the bias adjustment automatically
- 11 and print out the corrected values. Those Datamasters used in Washington do not now
- 12 do so.

#### 13 B. Datamaster test protocol

14 The Datamaster test protocol requires an individual to provide two different test samples.

15 Each is tested for alcohol content by the instrument, and a separate reading is produced

16 for each.

- 17 1. Unless the two readings are identical, the mean (average) of the readings is more
- 18 likely correct than either reading alone.
- 19 2. A bias corrected reading is always more accurate than an uncorrected reading.
- 20 3. The best estimate of an individual's true BAC reading is the bias corrected mean of
- 21 the values reported by the Datamaster.
- 22 4. The bias corrected mean may, when compared to the actual readings, produce a
- 23 substantially different result.
- 24 5. The bias corrected mean may produce results below the legal thresholds (.02, .04, .08,
- 25 .15) even when the actual test readings are both above the minimum level. In this
- situation there is a greater than 50% chance that the actual BAC reading is below the
- legal threshold.

140

6. The QAP protocols allow the use of a Datamaster with positive or negative bias up to and including 5% in each direction.
7. Without correcting for bias, all values reported by the Datamaster are artificially skewed by an amount up to 5%.
8. The bias values obtained during the QAP are reported on the web, so that if an individual knew where to look, and how to do the calculations, the actual reading could be obtained.
9. The failure to correct for bias may result in erroneous conclusions regarding whether a particular reading is above or below a legal limit.

#### IV. Uncertainty as applied the BAC Datamaster

- A. Every measurement made by every instrument has an error associated with it.
- B. Given the inherent variability of measurement, a statement of a measurement result is incomplete without a statement of the accompanying estimate of uncertainty, (i.e., the range of values within which the value of the measurand can be said to lie within a specified level of confidence).
- C. It is generally accepted in the scientific community that forensic reports, and testimony from them, must include a clear descriptor of the limitation of the analysis.
- D. There is no known state laboratory that routinely publishes this information for breath tests at this time. There are very few accredited forensic laboratories. It is expected that those state laboratories wishing to gain or retain accreditation will have to include a clear descriptor of the limitation of any analysis in the future. This will include the WTLD.
- E. All BAC measurements represent a range of values, any of which could represent the true value with a given level of confidence. Thus, no reliable result can be reported without an estimate of uncertainty.
- F. It is impossible to determine the likelihood that the result of a breath test - which is close to a legal limit - actually exceeds the legal limit without determining the uncertainty of the test.

1 G. The uncertainty associated with BAC testing will vary from one machine to another and  
2 from one QAP to another.

3 H. The confidence interval of a Datamaster result can be calculated using algebra and a  
4 statistical table. This is likely beyond the capabilities of most defendants, jurors,  
5 attorneys and judges.

6 1. The web site for the WSP Breath test section sets forth the methodology for  
7 determining uncertainty with the Datamaster.

8 2. Upon request the WTLD will calculate the bias and uncertainty associated with a  
9 particular test. Absent a request, the WTLD makes no report or mention of bias or  
10 uncertainty.

11 I. Absent the reporting of uncertainty, there is a substantial possibility that even an expert  
12 would not make a meaningful analysis of a particular breath reading.

13 1. Testimony revealed that many BAC readings in excess of .08, when considered in  
14 light of the confidence interval, are likely to have actual readings less than .08.

15 2. The top three officials of the WTLD were unable to accurately determine a true BAC  
16 without an uncertainty calculation.

17 J. The WTLD uses a common spreadsheet program to correct for bias and calculate  
18 uncertainty. Most of the information necessary is available from the QAP process and  
19 available on the web. The mean of the breath tests can be determined from information  
20 in the Datamaster. At the time of the QAP the uncertainty range for all possible BAC  
21 readings could be calculated for each Datamaster.

## 22 V. Policies and Procedures of WTLD

23 A. The policies and procedures to be used by the WTLD for calibration, QAP, and operation  
24 of the instrument are determined by the Washington State Toxicologist, Dr. Fiona  
25 Couper, pursuant to the Revised Code of Washington (RCW) and the Washington  
Administrative Code (WAC).

- 1 B. The protocols for the QAP have been applied and tested over many years. They require  
2 rigorous science, and their use reduces the inherent uncertainty of the test readings.  
3 Appropriate application of all protocols, however, will not eliminate instrument bias or  
4 measurement uncertainty.
- 5 C. The WTLD, like most medical and pathology laboratories, does not calculate uncertainty  
6 unless requested. However, testing for BAC has critical minimum standards which  
7 establish per se violations. This separates this subject from most diagnostic biological  
8 testing.
- 9 D. ISO and other standard setting organizations have required that uncertainty be included in  
10 measurement reports, but have delayed implementation of this requirement due to the  
11 inability of many to comply.
- 12 E. The WTLD can comply, and does provide this information upon specific request.
- 13 F. From October 2009 to August 2010 the WTLD has performed approximately 650 such  
14 calculations. Yet, in the same time frame there have been approximately 25,000 to 30,000  
15 BAC tests performed.
- 16 G. The WTLD is believed to be the only breath test program in the United States to measure  
17 uncertainty.
- 18 H. The WTLD is not required to meet ISO standards or be accredited. It does so voluntarily  
19 and as an indicator of the high standards this laboratory strives to attain.

### Background

20 In the previous ruling of this Court, State v. Sanafim Ahmach, et al., C00627921,<sup>2</sup>

21 (Ahmach), we suppressed the breath test results of Sanafim Ahmach and other similarly situated  
22 defendants. The bases for suppression were broad, but were all related directly to the inability, at  
23 the time, of the WTLD to produce a reliable work product. As stated in the Order Lifting BAC

24 <sup>2</sup> Pursuant to King County District Court (KCDC) local rule, LCcRLJ 8.2 (2), the Ahmach motion was declared a  
25 motion of countywide significance and heard by a three judge panel consisting of judges from different divisions of  
the KCDC. Those same three judges, Mark Chow, Darrell Phillipson and David Steiner, sat as a panel and heard  
evidence in these new cases.



1 Suppression under State v. Ahmach,<sup>3</sup> the WTLD has been reorganized and has received a high  
2 level of accreditation which reflects, among other things, very high quality assurance standards  
3 and rigorous scientific procedures. This court's previous ruling, however, pointed to one area  
4 which has received only partial effort from the WTLD, i.e., breath test machine bias. "Bias" is  
5 the tendency of a machine or device to measure consistently high or low.<sup>4</sup> Findings 48 through  
6 51 of the Ahmach decision outlined the problem presented by machine bias.<sup>5</sup> "Bias" is but one of  
7 the reasons that all measurements are "uncertain."<sup>6</sup>

8 Rod Gullberg, Research Analyst for the Washington State Patrol (and a driving force for  
9 quality control in the Washington State breath test program), defines "uncertainty" as "the degree  
10 to which a measurement result fails to exactly reproduce the quantitative and qualitative features  
11 of the property being measured (the measurand). All measurements possess uncertainty due to  
12 limitations in technology and methodology. Inaccuracy and imprecision are examples of  
13 uncertainty. No measurement is perfect. The important thing is that the uncertainty be known and  
14 minimized so the process is fit-for-purpose." Methodology and Quality Assurance in Forensic  
15 Breath Alcohol Analysis, R. G. Gullberg, Forensic Science Review, V. 12, Page 67 (2000).  
16

17 <sup>3</sup> The State requested that this Court enter two post-Ahmach orders; one clearly stating (if we were to decide) that  
18 the problems outlined in Ahmach had been corrected, and one ruling on the issue of uncertainty. While "instrument  
19 bias" was cited as a problem in Ahmach, instrument bias was tangential enough to Ahmach that this Court was able  
20 to accommodate — without defense objection — the State's request for two orders.

21 <sup>4</sup> "Bias" is also known as "systematic error."

22 <sup>5</sup> The findings related to machine bias were as follows:

23 48. All measuring machines have some bias, and Datamaster breath test machines have bias which is  
24 identified in the QAP process.

25 49. This bias is not determinable without testing; sometimes creating readings lower than actual and  
sometimes higher.

50. The bias of any particular machine can be determined from the information created during the QAP  
process by applying mathematical formulas and calculations. This information is not readily available to  
the public, though it is published on the web. Due to the complexity of the calculations and formula  
involved, few in the legal community are aware of this bias. The Breath Test Section of the Washington  
State Patrol does, however, provide this information to attorneys and defendants when requested.

51. The machine bias information could be easily made available to the defendants, attorneys and public by  
the State Toxicologist.

<sup>6</sup> "Uncertainty" as a concept is most closely related in the mind of the lay public to the concept of "margin of error."  
The term "margin of error," however, is a term most commonly used to express the margin of sampling error in a  
survey's results. The term "margin of error" is not used in the science of metrology, a science defined below.

1 As stated above, "bias" is only one of the components of uncertainty in a breath test  
2 measurement. Other contributors to measurement uncertainty include error created in collecting  
3 the biological sample and error created in the processes necessary to measure any substance,  
4 including instrument error and traceability error.<sup>7</sup>

5 Measurement uncertainty is a concept that is elemental in the science of "metrology."  
6 Metrology is defined by the International Bureau of Weights and Measures as "the science of  
7 measurement, embracing both experimental and theoretical determinations at any level of  
8 uncertainty in any field of science and technology."<sup>8</sup> Thus, breath-alcohol measurement is a  
9 metrological science which necessarily encompasses all aspects of the metrological field.

10 Like any scientific endeavor, metrology is not static, but is constantly in the process of  
11 refinement as new standards are proposed, reviewed and adopted. According to the International  
12 Organization for Standardization (ISO), "several factors combine to render a standard out of  
13 date: technological evolution, new methods and materials, new quality and safety requirements."  
14 About ISO: How are ISO standards developed? Exhibit 80. Thus, the measurement of  
15 uncertainty and its disclosure with any scientific measurement must be viewed as a step forward  
16 in the science of metrology.<sup>9</sup> Rather than indicating poor scientific procedures, a measurement  
17 for uncertainty presumes that all processes and procedures have been stringently followed.<sup>10</sup>

20 <sup>7</sup> Estimating the measurement uncertainty in forensic breath-alcohol analysis, Rod G. Gullberg, Accreditation and  
21 Quality Assurance: Journal for Quality, Comparability and Reliability in Chemical Measurement, Volume 11,  
22 Number 11, 562-568, 563 (2006), (see also in this Order, Findings of Fact, section (I.) (A.)).

23 <sup>8</sup> Fundamentals of Dimensional Metrology, Ted Busch, Wilkie Bros Foundation, Delmar Publishers.

24 <sup>9</sup> As previously stated, Rod Gullberg has been advocating for the measurement of uncertainty for years. Clearly, the  
25 forensic community as a whole has not been receptive. In a 2005 article Gullberg stated that "Unfortunately, few  
jurisdictions are able to clearly document measurement uncertainty and traceability. Moreover, established case law  
in many jurisdictions supports minimal analytical quality control and documentation which, unfortunately, provides  
little incentive to improve performance." Estimating the measurement uncertainty in forensic breath-alcohol  
analysis, Rod G. Gullberg, 563, Id.

<sup>10</sup> As stated in ICGM, Evaluation of measurement data – guide to the expression of uncertainty in measurement  
(GUM), "It is now widely recognized that, when all of the known or suspected components of error have been  
evaluated and the appropriate corrections have been applied, there still remains uncertainty about the correctness of

1 Properly understood, measurement for uncertainty may provide confidence in a result, rather  
2 than doubt.

3 At the root level, all metrological organizations recognize the importance of uncertainty  
4 in reporting measurements:

- 5 • When reporting the result of a measurement of a physical quantity, it is obligatory that  
6 some quantitative indication of the quality of the result be given so that those who use it  
7 can assess its reliability. Without such an indication, measurement results cannot be  
8 compared, either among themselves or with reference values given in a specification or  
9 standard. It is therefore necessary that there be a readily implemented, easily understood,  
10 and generally accepted procedure for characterizing the quality of a result of a  
11 measurement, that is, for evaluating and expressing its uncertainty. JCGM, Evaluation of  
12 measurement data – guide to the expression of uncertainty in measurement, (GUM),  
13 Introduction, section 0.1, 2008.
- 14 • Given the inherent variability of measurement, a statement of a measurement result is  
15 incomplete (perhaps even meaningless) without an accompanying statement of the  
16 estimated uncertainty of measurement (a parameter characterizing the range of values  
17 within which the value of the measurand can be said to lie within a specified level of  
18 confidence). G104-A2LA Guide for Estimation of Measurement Uncertainty In Testing,  
19 Introduction, P. 4, July 2002, Exhibit 13.
- 20 • Uncertainty of measurement is the most important single parameter that describes the  
21 quality of measurements. This is because uncertainty fundamentally affects the decisions  
22  
23  
24

25 the result, that is, a doubt about how well the result of the measurement represents the value of the quantity being  
measured." Introduction, Section 0.2, 2008.

1 that are based upon the measurement result. EURACHEM/CITAC Guide, Measurement  
2 uncertainty arising from sampling, Foreword, Page ii, First Edition, 2007, Exhibit 22.

- 3 • Knowledge of the uncertainty of measurement of testing results is fundamentally important  
4 for laboratories, their clients and all institutions using these results for comparative  
5 purposes. Competent laboratories know the performance of their testing methods and the  
6 uncertainty associated with the results. ILAC, Introducing the Concept of Uncertainty of  
7 Measurement in Testing in Association with the Application of the Standard ISO/IEC  
8 17025, Preamble, P. 4, Exhibit 50.
- 9 • Every measurement made has error associated with it, and, without a quantitative statement  
10 of the error, a measurement lacks worth. Indeed, without such a statement it lacks  
11 creditability. National Association of Testing Authorities, Assessment of Uncertainties of  
12 Measurement for Calibration and Testing Laboratories, Introduction, P. 8, 2002, Exhibit  
13 87.
- 14 • In general, the result of a measurement is only an approximation or estimate of the value of  
15 the specific quantity subject to measurement, that is, the measurand, and thus the result is  
16 complete only when accompanied by a quantitative statement of its uncertainty. NIST  
17 Technical Note 1297, 1994 Edition, Guidelines for Evaluating and Expressing the  
18 Uncertainty of NIST Measurement Results, Section 2.1, Exhibit 90.  
19  
20

21 Yet, not all professions which utilize the science of metrology account for and report  
22 uncertainty in their measurements. Forensic scientists, for the most part, are lagging behind the  
23 uncertainty curve. In a report prepared by the National Academy of Sciences in response to a  
24 Congressional request, the reporting committee stated that "few forensic science methods have  
25

1 developed adequate measures of the accuracy of inferences made by forensic scientists. All  
2 results for every forensic science method should indicate uncertainty in the measurements that  
3 are made....<sup>11</sup>

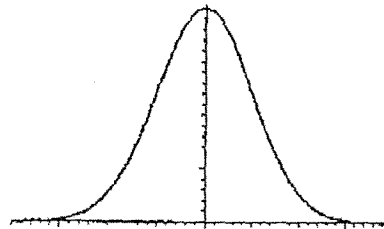
4 The WTLD now stands in stark contrast to the lab with the problems delineated in  
5 Ahmach. No longer complacent about its duties and the processes required for those duties, the  
6 WTLD is now moving into a leadership role in the field of forensic toxicology. Under the  
7 direction of the new Washington State Toxicologist, Dr. Fiona J. Couper, the WTLD is one of  
8 the few labs with a breath-alcohol calibration program that is accredited under the stringent  
9 standards of ISO 17025. Further, Dr. Couper has allowed Rod Gullberg, Breath Test Section  
10 Research Analyst, to move forward with his pioneering work in the determination and  
11 documentation of uncertainty in the area of breath-alcohol testing. In his career with the  
12 Washington State Patrol and now with the WTLD, Rod Gullberg has championed rigorous  
13 science and full disclosure. Knowledgeable, precise and forward thinking, Gullberg has pushed  
14 for the determination, documentation and disclosure of uncertainty in breath-alcohol testing. Of  
15 equal or greater importance, Gullberg has developed a sound method for the determination of  
16 uncertainty in breath-alcohol measurements.

17  
18 There are several accepted methods for determining and documenting uncertainty.  
19 Gullberg has chosen a method known as a "confidence interval." A "confidence interval" as "an  
20 interval this is symmetric about some sample statistic (e.g., the sample mean)....The limits of the  
21 confidence interval are functions of the desired confidence, the variability, and the sample size."<sup>12</sup>

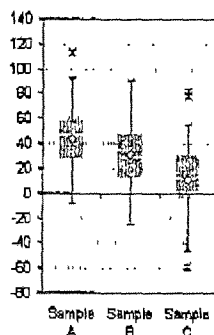
22  
23  
24 <sup>11</sup> National Research Council, Strengthening Forensic Science in the United States, A Path Forward, P. 184, 2009.  
25 Exhibit 83.

<sup>12</sup> Methodology and Quality Assurance in Forensic Breath Alcohol Analysis, R. G. Gullberg, Forensic Science Review, V. 12, Page 65 (2000).

A confidence interval may be shown graphically in many different ways. Two of the most



common graphical representations are the bell curve:<sup>13</sup>



and the error bar:<sup>14</sup>

Of course, it is also possible to present a breath-alcohol confidence interval by stating the mean breath-alcohol reading along with the lower possible breath-alcohol reading and the higher possible breath-alcohol reading. The confidence interval is then made complete when a statement of a "level of confidence" is attached. For example, a confidence interval for an 0.085 mean breath-alcohol reading might appear as follows: .0733 - .0961, with a 99% level of confidence.<sup>15</sup>

Rod Gullberg has used, published and taught his confidence interval method for at least the last decade. His work has been recognized as far away as Sweden. Professor A.W. Jones, PhD, DSc, from the Department of Forensic Toxicology, University Hospital, Sweden, refers to

<sup>13</sup> Representations of a confidence interval utilizing a bell curve will typically show the mean of two breath-alcohol measurements as the middle vertical bar; the lower horizontal line as the possible ranges of breath-alcohol (zero on the left and higher readings on the right) and the sides of the bell as the possible lower (left side) and higher (right side) mean breath-alcohol reading. The graph should also include a statement of the confidence interval, e.g., that there is 95% chance that the true mean breath-alcohol reading is within the area covered by the bell curve.

<sup>14</sup> Representations of a confidence interval utilizing an error bar or a "box and whiskers" graph (above) show the mean breath-alcohol reading as a dot or box in the middle of a bar and the possible lower and higher ranges of breath-alcohol are represented by the upper and lower arms of the line. The line on the left represents the possible ranges of breath-alcohol (zero on the bottom and higher readings on the top).

<sup>15</sup> This example appears in Exhibit 64.

1 Rod Gullberg in a paper titled Dealing with Uncertainty in Chemical Measurements.<sup>16</sup> Jones  
2 writes that his paper is not a "how to do it" text, "because for a proper understanding and  
3 interpretation a professional statistician (or Rod Gullberg, Washington State Patrol, Seattle, WA)  
4 should be consulted." Id, at p. 7.

5 In his testimony, Gullberg stated that the breath test program could produce a spreadsheet  
6 for each breath test machine<sup>17</sup> showing the confidence interval for each mean breath test  
7 measurement possible. Thus, the WTL D could provide a spreadsheet with each breath test  
8 reading, allowing a defendant to determine the possible range of his or her breath test in a simple  
9 and easy manner.<sup>18</sup> For reasons which were never clearly articulated by any State witness,  
10 however, the WTL D does not currently provide defendants with a confidence interval for breath  
11 test measurements unless specifically requested.

### 12 Analysis

13  
14 In Reese v. Stroh, 74 Wash.App. 550, (1994), Division I of the Court of Appeals  
15 documented three concerns related to scientific evidence.<sup>19</sup> First, the Court stated that:

16  
17 When a witness gives his personal opinion on the stand - even if he qualifies as an expert  
18 - the jurors may temper their acceptance of his testimony with a healthy skepticism born  
19 of their knowledge that all human beings are fallible. But the opposite may be true when  
20 the evidence is produced by a machine: like many laypersons, jurors tend to ascribe an  
21 inordinately high degree of certainty to proof derived from an apparently "scientific"  
mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds  
such evidence may well conceal the fact that it remains experimental and tentative.

22 <sup>16</sup> International Association for Chemical Testing Newsletter, Dealing with Uncertainty in Chemical Measurements,  
A. W. Jones, V. 14, N. 1 2003.

23 <sup>17</sup> The spreadsheet (likely an Excel spreadsheet), would be produced at the time that the QAP is completed for each  
breath test machine each year.

24 <sup>18</sup> A confidence interval for all possible breath test measurements may be produced at the time of the QAP because  
Gullberg's method uses a predetermined formula for the instrument, traceability and biological sampling "errors."  
The only "unknown error" is each breath test machine's bias, known once the QAP is complete.

25 <sup>19</sup> While the court in Reese v. Stroh, Id, was discussing the Frye Standard, the court's concerns relating to scientific  
evidence directly apply to the issues here. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

1 Id, at 558. Second, the Court stated that it was concerned about the inherent financial and  
2 resource "disadvantages a criminal defendant faces and the difficult task of defending against  
3 evidence derived from seemingly infallible scientific techniques." Id, at 558-559. Third, the  
4 Court stated that "a criminal defendant is constitutionally guaranteed the right to a fair trial, and  
5 the State must prove the defendant's guilt beyond a reasonable doubt. The prosecution should not  
6 be permitted to prove its case through the use of less than highly-reliable methodologies and  
7 techniques." Id. Overall, the Reese court was concerned about "black boxes,"<sup>20</sup> which they called  
8 "technologies that, because they are mechanical or mysterious, appear infallible to the average  
9 juror." Id, at 558. A BAC Datamaster is certainly a "black box," as that term is used in Reese.  
10 Further, a breath-alcohol measurement is a reading that will appear final and complete to the  
11 average person, unaware of the metrological requirement for a measurement of uncertainty.

12 Scientists, however, aware of the lack of uncertainty measurements in forensic science, are  
13 attempting to push the forensic community forward:

- 14 • As a general matter, laboratory reports generated as the result of a scientific analysis  
15 should be complete and thorough. They should describe, at a minimum, methods and  
16 materials, procedures, results, and conclusions, and they should identify, as appropriate,  
17 the sources of uncertainty in the procedures and conclusions along with estimates of their  
18 scale (to indicate the level of confidence in the results). National Research Council,  
19 Strengthening Forensic Science in the United States. A Path Forward. P. 186, 2009.  
20 Exhibit 83.  
21 • It is generally agreed that the usefulness of measurement results, and thus much of the  
22 information that we provide as an institution, is to a large extent determined by the  
23  
24

25 <sup>20</sup> The Reese court cited two California cases for its use of the term "black box." People v. Stoll, 49 Cal.3d 1136,  
783 P.2d 698, 265 Cal.Rptr. 111 (1989); People v. McDonald, 37 Cal.3d 351, 690 P.2d 709, 208 Cal.Rptr. 236  
(1984).



1 quality of the statements of uncertainty that accompany them. For example, only if  
2 quantitative and thoroughly documented statements of uncertainty accompany the results  
3 of NIST calibrations can the users of our calibration services establish their level of  
4 traceability to the U. S. standard of measurement maintained at NIST. National Institute  
5 of Standards and Technology, Guidelines for Evaluation and Expressing the Uncertainty  
6 of NIST Measurement Results, Foreword (to the 1993 Edition) 1994.

- 7 • Knowledge of the uncertainty associated with measurement results is essential to the  
8 interpretation of the results....Without information on uncertainty, there is a risk of  
9 misinterpretation of the results. Incorrect decisions taken on such a basis may result in  
10 unnecessary expenditure in industry, incorrect prosecution in law, or adverse health or  
11 social consequences. ISO/TS 21748, Guidance for the use of repeatability, reproducibility  
12 and trueness estimates in measurement uncertainty estimation, First Edition, Introduction,  
13 2004.

- 14 • No important measurement process is complete until the results have been clearly  
15 communicated to and understood by the appropriate decision maker. Forensic  
16 measurements are made for important reasons. People, often unfamiliar with analytical  
17 concepts, will be making important decisions based on these results. Part of the forensic  
18 toxicologist's responsibility is to communicate the best measurement estimate along with  
19 its uncertainty. Insufficient communication and interpretation of measurement results  
20 can introduce more uncertainty than the analytical process itself. The best  
21 instrumentation along with the most credible protocols ensuring the highest possible  
22 quality control will not compensate for the unclear and insufficient communication of  
23 measurement results and their significance. Rod Gullberg, Statistical Applications in  
24  
25

Forensic Toxicology. Medical-Legal Aspects of Alcohol. P. 457, 504 James Garriott  
Editor, 5<sup>th</sup> Ed. 2009.

In September of 2009, the WTLD advanced the cause of accuracy and thus, justice in the area of forensic breath-alcohol testing when it formally adopted Rod Gullberg's procedures for the determination of the confidence intervals in breath tests in Washington State.<sup>21</sup> Yet, as previously stated, at the same time the WTLD, inexplicably, decided not to report uncertainty in all breath-alcohol readings.<sup>22</sup> For those savvy enough to determine that it was available, the new policy provided that a breath-alcohol test confidence interval would be provided upon request as resourced permitted. Thus, breath-alcohol measurements would still be offered without a confidence interval, defendants would not be informed that a confidence interval was available, and the confidence interval would be provided only as resources permitted. While it appears likely that the WTLD is moving toward the point where it will provide confidence intervals in all breath-alcohol measurements, the WTLD has not yet set a time frame for the disclosure of uncertainty in all breath-alcohol measurements.

#### **Limited Case Law Authority on Uncertainty**

Only two other state courts have specifically considered the issue of uncertainty as it relates to breath-alcohol tests. In those two cases, the Nebraska Supreme Court and a Hawaii appellate court determined that the State's failure to include an uncertainty measurement along with the breath test reading left the trier of fact without a critical fact. The Nebraska Supreme Court stated:

---

<sup>21</sup> This step forward may serve as a catalyst to move breath-alcohol testing on a national level toward more rigorous science.

<sup>22</sup> In fact, WTLD procedures do not even inform a defendant of the availability of an uncertainty measurement.

1 While the Legislature has the acknowledged right to prescribe acceptable methods  
2 of testing for alcohol content in body fluids and perhaps even the right to prescribe that  
3 such evidence is admissible in a court of law, it is a judicial determination as to whether  
4 this evidence is sufficient to sustain a conviction, if the evidence is believed. The  
5 Legislature has selected a particular percent of alcohol to be a criminal offense if present  
6 in a person operating a motor vehicle. It is not unreasonable to require that the test,  
7 designed to show that percent, do so outside of any error or tolerance inherent in the  
8 testing process.

9 State v. Bjornsen, 201 Neb. 709, 271 N.W.2d 839, 840 (1978). The same reasoning was reflected  
10 in the decision of the Hawaii appellate court:

11 In both of the cases at bar, the State has failed to establish a critical fact. The State  
12 merely demonstrated that the reading of the breathalyzer machine was 0.10% for  
13 Defendant Boehmer and 0.11% for Defendant Gogo. The inherent margin of error could  
14 put both defendants' actual blood alcohol level below the level necessary for the  
15 presumption to arise. The failure of the prosecution to establish beyond a reasonable  
16 doubt that the actual weight of alcohol in defendants' blood was at least .10% required the  
17 trial judge to ignore the statutory presumption in its determination.

18 State v. Boehmer, 1 Haw.App. 44, 47 (1980). While these cases only stand for the proposition  
19 that breath tests close to a legal reference level may not be relied upon for a per se conviction,  
20 they also reflect that fact that the only two state courts to consider the question of uncertainty in  
21 breath test cases both determined that the issue was one of great importance.

### 22 **Due Process and Discovery Requirements**

23 The WTLD understandably believes that it should not have to defend its uncertainty  
24 procedures when it is leading the nation's forensic laboratories and breath test programs in that  
25 very area. Yet, in criminal justice, the actions of all participants are appropriately affected by  
every defendant's constitutional rights.

A good detective may be certain that an already identified suspect committed a crime, yet in  
the process of gathering evidence, he or she will let the evidence lead where it may. The same

1 detective will then testify truthfully and completely, letting the criminal justice system reach an  
2 independent conclusion as to guilt or innocence.

3 A prosecutor is a participant in a system of criminal justice which is, by design, adversarial.  
4 Yet, a good prosecutor will never let the desire to "win" overcome his or her sense of justice.

5 A trial court will follow precedent when it rules on matters before the court, but precedent  
6 will never be allowed to overcome the determination of a good judge to do justice in each and  
7 every case.<sup>23</sup>

8 What was trustworthy and reliable yesterday may not be today. As concepts of justice  
9 advance through each generation of police, criminal justice practitioners,<sup>24</sup> attorneys and judges,  
10 we aim to provide better justice than was provided by those before us.<sup>25</sup> As concepts of science  
11 change, we also need to be ready to move forward with those new, better practices.<sup>26</sup>

13 <sup>23</sup> Provided, of course, that the judge can articulate a basis distinguishing, in some manner, the precedent from the  
14 case at hand.

15 <sup>24</sup> Here, we do intend to refer to all of the dedicated scientists and administrators in the WTLD.

16 <sup>25</sup> We do this, of course, by standing on the shoulders of all previous criminal justice practitioners.

17 <sup>26</sup> As Judge Harry T. Edwards, stated:

18 In my testimony before the Senate Judiciary Committee in March 2009, I suggested –  
19 contrary to the mischaracterization of my position in the Government's briefs – that "courts  
20 [would] take the findings of the committee regarding the scientific foundation of particular types  
21 of forensic science evidence into account when considering the admissibility of such evidence in a  
22 particular case." As I explained to the Senate Committee, because the Report presents "findings  
23 about the current status of the scientific foundation of particular areas of forensic science," it  
24 would be "no surprise if the report is cited authoritatively" by the courts in their assessment of  
25 particular cases.

26 Why was that my prediction? Because it seemed quite obvious, at least to me, that if a  
particular forensic methodology or practice, once thought to be scientifically valid, has been  
revealed to lack validation or reliability, no prosecutor would offer evidence derived from that  
discipline without taking the new information into account and no judge would continue to admit  
such evidence without considering the new information regarding the scientific validity and  
reliability of its source. Nothing in Frye or Daubert commands unyielding adherence to past  
methodologies or practices once they are found wanting. As one state court in a Frye jurisdiction  
has aptly observed:

Science moves inexorably forward and hypotheses or methodologies once  
considered sacrosanct are modified or discarded. The judicial system, with its search for  
the closest approximation to the "truth," must accommodate this ever-changing scientific  
landscape.

1 Nor should the court allow an instrument or a machine to determine an element of a criminal  
2 offense - unless there are appropriate safeguards to ensure that the evidence provided by the  
3 machine is what it purports to be. It bears repeating that - these safeguards are foundational to  
4 our criminal justice system. As stated in Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10  
5 L.Ed.2d 215 (1963):

6 Society wins not only when the guilty are convicted but when criminal trials are fair;  
7 our system of the administration of justice suffers when any accused is treated unfairly.  
8 An inscription on the walls of the Department of Justice states the proposition candidly  
9 for the federal domain: 'The United States wins its point whenever justice is done its  
10 citizens in the courts.'

11 When a witness is sworn in, he or she most often swears to "tell the truth, the whole truth,  
12 and nothing but the truth."<sup>27</sup> In other words, a witness may make a statement that is true, as far as  
13 it goes. Yet there is often more information known to the witness, which if provided, would tend  
14 to change the impact of the information already provided. Such is the case when the State  
15 presents a breath-alcohol reading without revealing the whole truth about it. That whole truth, of  
16 course, is that the reading is only a "best estimate"<sup>28</sup> of a defendant's breath-alcohol content. The  
17 true measurement is always the measurement coupled with its uncertainty.

18 The Fifth Amendment to the United States constitution requires that no person be "deprived  
19 of life, liberty, or property, without due process of law." Most, if not all of the criminal rules of

20 The Supreme Court made the same point in Daubert when it reminded us that "scientific  
21 conclusions are subject to perpetual revision." I really do not understand how any jurist could  
22 reasonably think otherwise.

23 The Honorable Harry T. Edwards, The National Academy of Sciences Report on Forensic Sciences: What it Means  
24 for the Bench and Bar, Page 5, May 6, 2010, (footnotes omitted). Judge Edwards was a participant in the panel  
25 which produced the report titled: National Research Council, Strengthening Forensic Science in the United States, A  
Path Forward, Id.

26 <sup>27</sup> ER 603 requires that a witness state an oath or affirmation before testifying and RCW 5.28.020 suggests that: "the  
27 person who swears holds up his hand, while the person administering the oath thus addresses him: "You do  
28 solemnly swear that the evidence you shall give in the issue (or matter) now pending between . . . . . and . . . . .  
29 shall be the truth, the whole truth, and nothing but the truth, so help you God."

30 <sup>28</sup> In argument, the State used the term "best estimate" many times when describing a breath-alcohol measurement  
31 which did not yet have a confidence interval attached to it.

32 ORDER SUPPRESSING DEFENDANT'S BREATH-ALCOHOL MEASUREMENTS  
33 AGENCY RECORD

1 procedure and rules of evidence are designed to ensure a defendant's right to a fair trial.<sup>29</sup>  
2 Fundamental to this is a defendant's right to discovery. "The Fifth Amendment to the United  
3 States requires that prosecutors make available evidence "favorable to an accused ... where the  
4 evidence is material either to guilt or to punishment." " State v. Boyd, 160 Wash.2d 424, 434,  
5 (2007), (quoting Brady v. Maryland, Id. at 87-88). The process and the result of discovery is a  
6 very important part of the criminal justice procedure. In a comment to proposed Rule CrR 4.7,<sup>30</sup>  
7 the Criminal Rules Task Force stated:

8 "In order to provide *adequate information for informed pleas, expedite trials, minimize*  
9 *surprise, afford opportunity for effective cross-examination, and meet the requirements of*  
10 *due process*, discovery prior to trial should be as full and free as possible consistent with  
11 protections of persons, effective law enforcement, the adversary system, and national  
12 security."

13 State v. Yates, 111 Wash.2d 793, 797 (1988) (emphasis added) (quoting Criminal Rules Task  
14 Force, Washington Proposed Rules of Criminal Procedure 77). See also, State v. Boyd, Id.

15 In addition to the requirements of due process, a prosecutor must also provide a  
16 defendant with exculpatory evidence pursuant to court rule:

17 Except as otherwise provided by protective orders, the prosecuting authority shall  
18 disclose to defendant's lawyer any material or information within his or her knowledge  
19 which tends to negate defendant's guilt as to the offense charged.

20 CrRLJ 4.7 (a) (3)<sup>31</sup>.

21 <sup>29</sup> A preliminary statement in the Rules of Criminal Procedure states that "these rules are intended to provide for the  
22 just determination of every criminal proceeding." The rules also state that they should be construed to secure  
23 "effective justice." CrRLJ 1.2. A preliminary statement in the rules of evidence states that they are designed "to the  
24 end that the truth may be ascertained and proceedings may be justly determined."

25 <sup>30</sup> The discovery rules for courts of general jurisdiction (CrR) and the discovery rules for courts of limited  
jurisdiction (CrRLJ) are substantially similar.

<sup>31</sup> Nor may a prosecutor argue that he or she has turned over all exculpatory evidence in the prosecutor's file and  
does not have the information. As stated in, In re Brennan, 117 Wash.App. 797, 804-805 (2003) :

26 In the 1963 case of Brady v. Maryland, [Id.] the United States Supreme Court held that state prosecutors  
27 violate a defendant's right to due process when evidence favorable to a defendant is not disclosed. The  
28 prosecutor's good faith is unimportant. Further, a prosecutor has the duty to learn of evidence favorable to  
29 the defendant that is known to others acting on behalf of the government in a particular case, including the  
30 police.

1 When an individual suspected of Driving Under the Influence submits to a test to measure his  
2 or her breath-alcohol content, the breath test instrument will produce two separate readings<sup>32</sup> and  
3 the mean of the two samples constitutes his or her breath-alcohol level. Absent a high level of  
4 scientific knowledge, this has historically been the end of the line for breath test evidence. Now,  
5 however, the availability of a confidence interval for breath-alcohol measurements means that  
6 laypeople can understand the true possible value of a mean breath-alcohol measurement. For  
7 most people, that understanding will be a revelation. For example, the following mean breath test  
8 measurements were taken from Washington State BAC Datamaster breath test measurements:<sup>33</sup>

- 9 • Mean result: 0.1545; Confidence interval: 0.1371 - 0.1766
- 10 • Mean result: 0.875; Confidence interval: 0.0769 - 0.1007
- 11 • Mean result: 0.1505; Confidence interval: 0.1387 - 0.1608
- 12 • Mean result: 0.085; Confidence interval: 0.0731 - 0.0877

13  
14 These confidence intervals represent a 99% level of confidence.

15 When breath-alcohol measurements are close to a reference level (e.g., 0.08),<sup>34</sup> the need  
16 for discovery of breath test measurement confidence intervals is obvious. Nonetheless, when one  
17  
18  
19  
20

21  
22 The purpose of holding police and others assisting prosecutors so accountable is that "[e]xculpatory  
23 evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it."  
Otherwise, prosecutors could instruct those assisting them not to give the prosecutor certain types of  
information, resulting in police and other investigating agencies acting as the final arbiters of justice.

(Footnotes omitted.)

24 <sup>32</sup> A suspect provides two separate samples of his or her breath.

25 <sup>33</sup> These results are contained in Exhibit 64 and were obtained from DUI suspects in Washington State. The  
confidence intervals were determined by the WTLD using the method now adopted by the WTLD.

<sup>34</sup> The most important reference level in Washington State is the 0.80 level. But as noted in Ahmach, three other  
reference levels exist: 0.02, 0.04 and 0.15.)

1 (mean) breath-alcohol measurement may constitute the principle element in a criminal charge, it  
2 is hard to imagine a situation where a confidence level would not be important.<sup>35</sup>

3 Thus, we now place the State on notice that every discovery packet supplied to  
4 defendants must contain the confidence interval for any breath-alcohol measurement the State  
5 intends to offer into evidence in that case. Should the State fail to comply with this discovery  
6 order, then upon objection, such breath-alcohol measurement will not be admitted at trial.

7 Moreover, should the State fail to comply with this discovery order, upon appeal of any  
8 guilty verdict where one of the elements is a breath-alcohol reading above the legal limit, the  
9 State may subject itself to an appeal of the verdict upon the ground that it failed to provide  
10 exculpatory evidence to the defendant. Should the appellate court determine that the failure to  
11 disclose the confidence interval was "material either to guilt or punishment," the defendant's  
12 conviction would be reversed. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 3379, 87  
13 L.Ed.2d 481 (1985).  
14

#### 15 ER 702 and Confidence Intervals

16 As we stated in Ahmach:

17  
18 A breath test reading is not admissible absent expert testimony, either in person or  
19 by affidavit as allowed by CrRLJ 6.13(c). Pursuant to ER 702, however, an expert may  
20 only testify "if scientific, technical, or other specialized knowledge will assist the trier of  
21 fact to understand the evidence or to determine a fact in issue." In a criminal prosecution,  
22 a post Frye analysis of the admissibility of expert testimony under ER 702 is a  
23 consequential activity with independent force and effect. "In this state ER 702 has a

24  
25 <sup>35</sup> In hindsight (post-trial), it may be possible to determine how much weight a jury may have placed upon a breath-  
alcohol measurement relative to all other evidence. At the pretrial stage it is much more difficult to make that  
determination.

It is also worth noting that, with breath-alcohol readings which are not close to a reference level, jurors may  
actually find that the existence of a confidence level gives them more confidence in the final result – based upon the  
fact that so much effort has gone into ensuring that an accurate measurement is ultimately produced. This Court is  
not making such a determination. It is enough to understand that a jury may give less weight to a breath-alcohol  
measurement with a confidence interval.



significant role to play in admissibility of scientific evidence aside from Frye." State v. Copeland, 130 Wn.2d 244, 259-260 (1996).

Under Jensen, [City of Fircrest v. Jensen, 158 Wn.2d 384, (2006)] therefore, after the prosecution has met its prima facie burden for the admission of a BAC reading, a trial court must engage in a meaningful review of the admissibility of the BAC evidence involving, under ER 702, a two part test. State v. Cauthron, 120 Wn.2d 879, 890 (1993). As in Copland, [State v. Copeland, 130 Wn.2d 244 (1996)], the Cauthron court was concerned with the admissibility of DNA evidence:

The 2-part test to be applied under ER 702 is whether: (1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact. Part 2 of this standard should be applied by the trial court to determine if the particularities of the DNA typing in a given case warrant closer scrutiny. If there is a precise problem identified by the defense which would render the test unreliable, then the testimony might not meet the requirements of ER 702 because it would not be helpful to the trier of fact.

Cauthron, [State v. Cauthron, 120 Wn.2d 879, 890 (1993)].

Ahmach, p. 14. (Footnotes omitted.)

In Cauthron, Id, the court considered the admissibility of DNA typing. Before reaching their decision, the Cauthron court cited a report on DNA typing produced by the National Academy of Sciences.<sup>36</sup> Ultimately the court concluded that:

The Committee's view supports the conclusions reached in the courts:

To say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless.

Cauthron, Id, at 907, (quoting DNA Technology, at 74.)

<sup>36</sup> The Cauthron court stated:

"Cauthron appealed and we accepted certification from the Court of Appeals. After oral argument, but before the court issued its opinion, we requested additional briefing on the applicability of a National Academy of Sciences document: Committee on DNA Technology in Forensic Science, DNA Technology in Forensic Science (National Academy Press 1992) (hereinafter DNA Technology). A committee of eminent scientists and jurists (hereinafter Committee) exhaustively researched and analyzed the current status of forensic DNA typing."

Cauthron, Id, at 885.

1 Here, the State argues that it should be allowed to present breath-alcohol readings without  
2 also providing an accompanying estimate of uncertainty. While a breath-alcohol measurement  
3 has meaning without a confidence interval, a breath-alcohol measurement without a confidence  
4 interval is inherently misleading.

5 In State v. Stenson, 132 Wash.2d 668 (1997), the court was presented with a scientific  
6 process or procedure which produced a result. However, that result, it was determined, would not  
7 have been admissible without, for lack of a better word, a proviso.

8 In Stenson, a phenol test was administered on an apparent blood splatter to determine if it  
9 was, in fact, blood. A phenol test, however, is only a "presumptive" test for blood. So the  
10 Stenson court stated:

11 Since the jury repeatedly heard that the phenol test was only presumptive for the presence  
12 of blood and did not confirm the stains were in fact human blood, the question was one of  
13 weight and not of admissibility. Lack of certainty in scientific tests (that are generally  
14 accepted by the scientific community) goes to the weight to be given the testimony, not to  
15 its admissibility. Lord, [State v. Lord, 117 Wash.2d 829, 854-55 (1991)]. Similarly, the  
16 credibility of experts offering conflicting testimony is for the trier of fact. State v. Benn,  
120 Wash.2d 631, 662, 845 P.2d 289 (1993). *So long as a jury is clearly told that the  
phenol test is only a presumptive test and may indicate a substance other than human  
blood, it is admissible under ER 702.*

17 Id, at 717-18, (Emphasis supplied). Once a person is able to see a confidence interval along with  
18 a breath-alcohol measurement, it becomes clear that all breath-alcohol tests (without a  
19 confidence interval) are only presumptive tests. The presumption, or course, is that a breath-  
20 alcohol reading is the mean of two breath samples. This answer, however, is obviously  
21 incomplete.<sup>37</sup> As discussed above, a breath test reading is only a "best estimate" of an  
22 individual's breath-alcohol level. The determination of a confidence interval completes the  
23 evidence.  
24

25 <sup>37</sup> Put another way, a breath-alcohol measurement without an uncertainty measurement does not tell the "whole  
truth." RCW 5.28.020.

1 Therefore, upon objection, a breath-alcohol measurement will not be admitted absent its  
2 uncertainty level, presented as a confidence interval.<sup>38</sup>

3  
4 **ER 403, ER 901 and Foundational Requirements**

5 Defendants also argue for suppression of breath-alcohol measurements, absent a  
6 measurement for uncertainty, under ER 403, and in later supplemental briefing, under ER 901.  
7 While Defendant's make a compelling argument for suppression under ER 403<sup>39</sup> and ER 901,<sup>40</sup>  
8 case law supporting suppression under these court rules - in the area of scientific processes - is  
9 lacking. Courts have historically cited ER 702 when dealing with scientific processes. Arguably,  
10 ER 901 (a) (9) may provide a better fit when specifically considering a scientific/mechanical  
11 process which produces a result. Yet, the case cited by defendants<sup>41</sup> follows a line of cases  
12 dealing with the authentication of the processes used to determine whether a speed measuring  
13 device used in traffic infractions produces an accurate result. Again, while these cases are  
14 analogous on a logical level, they do not represent strong authority under the facts herein.  
15  
16

17 <sup>38</sup> To be clear, the WTLD could decide that uncertainty should be shown by an alternate scientifically acceptable  
18 method. This decision is left to the WTLD or any witness presented by the State or a defendant. It is unlikely,  
19 however, that the WTLD will change course and use anything other than the Rod Gullberg developed confidence  
20 interval for breath-alcohol measurements.

21 <sup>39</sup> ER 403 states that:

22 Although relevant, evidence may be excluded if its probative value is substantially outweighed by the  
23 danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue  
24 delay, waste of time, or needless presentation of cumulative evidence.

25 <sup>40</sup> ER 901 states (in relevant part):

(a) General Provision. The requirement of authentication or identification as a condition precedent to  
admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its  
proponent claims.

...  
(9) Process or System. Evidence describing a process or system used to produce a result and showing  
that the process or system produces an accurate result.

<sup>41</sup> State v. Bashaw, 169 Wn.2d 133 (2010).

1 The State, on the other hand, in addition to arguing that ER 702 and ER 403 do not apply,  
2 also argues that this panel should focus on the question of the basic foundational requirements of  
3 statute,<sup>42</sup> the protocols of the WTLD and the protocols of most, if not all, other state breath test  
4 programs. Yet, as stated in Jensen, Id, a trial court will consider the requirements and restrictions  
5 of ER 702 after the state has met its prima facie burden for the admissibility of evidence, i.e.,  
6 after the State has met its foundational burden.

### 8 Remedy

9 Under the Due Process Clause, the Rules of Criminal Procedure and ER 702, absent a  
10 confidence interval, a breath-alcohol measurement will be suppressed. In juxtaposition, however,  
11 to the more common bases for suppression, an order of suppression related to the State's failure  
12 to provide a confidence interval with a breath-alcohol measurement will remain in effect only so  
13 long as the State fails to produce the confidence interval.<sup>43</sup> For Mr. Fausto and Ms. Ballow, the  
14 State may easily remedy the omission by providing the confidence interval for each defendant's  
15 mean breath-alcohol measurement.<sup>44</sup>

17 <sup>42</sup> RCW 46.61.506 (1).

18 <sup>43</sup> For discovery violations, Division I of the Court of Appeals has stated that "significantly, exclusion of evidence  
19 as a sanction was expressly rejected by the Washington Judicial Council and the Washington Supreme Court." State  
v. Glasper, 12 Wash.App. 36, 38 (1974).

20 See also, CrRLJ (H) (7) (i), which states:

21 If at any time during the course of the proceedings it is brought to the attention of the court that a party has  
22 failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order  
23 such party to permit the discovery of material and information not previously disclosed, grant a  
24 continuance, or enter such other order as it deems just under the circumstances.

25 Most CrRLJ 3.6 motions will result in a suppression order which is final, unless appealed. In these common CrRLJ  
3.6 motions, suppression occurs because the State cannot remedy the problem (or failed to provide testimony that  
would support probable cause to stop, detain or arrest the defendant).

<sup>44</sup> In all other cases, the State should provide confidence intervals in discovery. In cases where discovery is already  
complete, the State should provide confidence intervals as soon as it is able. Because of the sweeping nature of this  
ruling, should the State require more time, leave for more time should be requested of the trial court in each separate  
case. Absent approval of the trial court judge, the State should not adopt a policy of waiting until trial to remedy the  
absence of a confidence interval. Should the State mistakenly decide to follow such a course, the trial court would

**Conclusion**

The WTLD has greatly advanced the forensic science involved in breath-alcohol testing with the adoption of a procedure for the determination of uncertainty through the use of a confidence interval. Attaching a confidence interval to a breath-alcohol measurement is, at the same time, both impressive - in the increased reliability of all breath test readings - and stunning - when it is seen that, absent a confidence interval, a "final" breath-alcohol measurement is only a "best estimate" of a person's breath-alcohol level. Given the requirements of due process, the discovery rules and ER 702, therefore, the State must provide Defendants with a confidence interval for each Defendant's breath-alcohol measurement. Absent this information, a defendant's breath-alcohol measurement will be suppressed.

Dated this 21st day of September, 2010

\_\_\_\_\_  
Judge David Steiner

\_\_\_\_\_  
Judge Darrell Phillipson

\_\_\_\_\_  
Judge Mark Chow

have the power to grant such orders as it deems just, including the power grant the defendant a continuance and the power to impose sanctions.

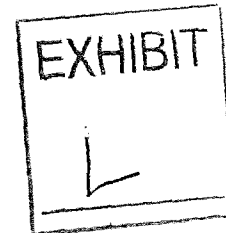
ORDER SUPPRESSING DEFENDANT'S BREATH-ALCOHOL MEASUREMENTS  
AGENCY RECORD

IN THE ABSENCE OF A MEASUREMENT FOR UNCERTAINTY - 31

164

128

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Idaho State Bar No. 3058



VIA FACSIMILE ONLY (208) 332-7810

Idaho Transportation Department  
Driver Services Section

RE: GEORGE JAY BEYER, JR.  
DOB: [REDACTED]  
SS/DL#: [REDACTED]  
ARRESTED: November 6, 2010

### MOTION TO STRIKE BREATH TEST

COMES NOW the Driver, GEORGE J. BEYER, by and through his undersigned attorney of record, Charles M. Stroschein of the law firm of Clark and Feeney, LLP, Lewiston, Idaho, and requests that the hearing officer strike the breath test results for the failure to comply with the observation period.

The hearing officer can view a number of Idaho cases that are on point and are discussed below. As the hearing officer is aware, there has to be a 15 minute observation period prior to breath testing. See State v. Stump, 146 Idaho 857 (Ct. App. 2009). The Stump case is interesting because it points to the specific standard of observation required.

In Stump, the driver was transported to the Teton County Sheriff's office to test his breath

MOTION TO STRIKE  
BREATH TEST

-1-

AGENCY RECORD

alcohol using an Intoxilyzer 5000. The arresting officer was in the same room with Mr. Stump. The Court noted that there was no evidence in the record of any circumstances or conditions inside the room which might have interfered with or impaired the arresting officer's senses. Officer Hurt also advised Mr. Stump to tell him if he had belched or regurgitated during the 15 minute wait. In Mr. Beyer's case, the arresting officer did not tell Mr. Beyer to advise him of any belching, burping, or the like. In Mr. Beyer's case, they were outside.

The Court noted in State v. DeFranco, 143 Idaho 335, 338, 144 P.3d 40, 43 (Ct. App. 2006) that the fifteen minute monitoring period is not an odorous burden and will be met if the Officer stays in close physical proximity to the test subject so the Officer's senses of sight, smell and hearing can be employed.

In State v. Carson, 133 Idaho 451, (Ct. App. 1999), the Court was faced with a 15 minute wait that occurred in a law enforcement vehicle while the driver was being transported to the Washington County Sheriff's Office to use the Intoxilyzer 5000. In that case, Mr. Carson was asked if he had belched or vomited or burped, etc. during the drive. The arresting officer said he intermittently observed Mr. Carson in the rearview mirror and listened for any indication of belching or regurgitation. The arresting officer testified that because of the late hour he encountered no traffic on the road and his police radio was quiet throughout the trip. The officer then acknowledged during cross examination that

166

MOTION TO STRIKE  
BREATH TEST

-2-

AGENCY RECORD

130

is was raining and that the windshield wipers were operating. The Court found that the arresting officer's attention was not devoted to Mr. Carlson and that evidence presented at the motion hearing and common sense, tells us that an officer's ability to use his hearing as a substitute for visual observation was impeded by noise with the automobile engine, tires on the road, rain and windshield wipers.

In State v. DeFranco, (supra), a similar situation to Mr. Beyer's case is presented. The instrument used was the AlcoSensor III. In DeFranco, the officer left the patrol car's rear door open and entered through the front passenger door, called dispatch momentarily and removed his AlcoSensor equipment that had been on the front seat. He then walked to the rear of the vehicle, opened the trunk and looked through a file box to find a advisory form. The Court found that the observation period was not possible based on these circumstances.

The Court noted that, as in Carson, the officer was not always in a physical position to either use his sight or alternatively his senses of smell or hearing to accomplish the purpose of the monitoring period.

In Beyer, it is clear that Trooper Talbott's attention was distracted from Mr. Beyer because of the arrival of the tow truck. It is clear that during the alleged 15 minute wait, Trooper Talbott was on his radio with dispatch and specifically had to look at the tow truck. He even commented to Mr. Beyer that it would have been easier for the tow truck

MOTION TO STRIKE  
BREATH TEST

-3-

AGENCY RECORD

167

131



driver to have gone around the vehicle and then he would have had a straight shot at putting Mr. Beyer's vehicle on the flat bed truck. Trooper Talbott then had to yell at the tow truck driver to leave the vehicle alone until he was done. It is clear that during the 15 minute wait, Trooper Talbott's attention was directed, both sight and hearing, towards the tow truck driver and not Mr. Beyer. It is also clear, that Thain Road was quite a busy road during the period of time Mr. Beyer sat in the back of the Trooper's vehicle.

It should also be noted that the video tape that was received by Counsel is not a complete video-taping of what occurred. It has come to Counsel's attention that there is an internal camera that the trooper turned on at approximately 2:43 hours on November 6, 2010. This inside portion of the video is not part of the record that was sent to Counsel for Mr. Beyer from the Idaho Transportation Department. Mr. Beyer has a right to receive the entire record of his stop and the fact that the video tape was tampered with or was not replicated in an accurate fashion is detrimental to Mr. Beyer's burden of proof. There is no explanation presented as to why the internal camera portion of the video was not included.

It is interesting to note the final comments by the Court of Appeals in DeFranco.  
(supra):

"If an officer deviates from that practice, without beginning the fifteen minute period anew, which is always an alternative in cases of uncertainty, the officer risks that the breath test results will be rendered inadmissible. Such is the result here."

At p. 338

AGENCY RECORD  
BREATH TEST

It is clear that the officer did not complete the 15 minute wait observation period. He was distracted by outside influences. This is not a situation in which Mr. Beyer and the officer were enclosed in a ten foot room. Mr. Beyer was sitting in the back of an ISP vehicle, in a parking lot, next to one of the busiest streets in Lewiston as is obvious by the amount of traffic that went by the video. There was even foot traffic that passed by during the course of the contact with Mr. Beyer. One would have to assume that the Trooper's attention probably focused on the foot traffic for a period of time because of officer safety. One has to wonder exactly where the breath "instrument" was that the Trooper retrieved for the benefit of breath testing in this particular case.

The credibility of the two witnesses that testified is called into question. There is nothing on this record that would indicate that Mr. Beyer's credibility should be questioned, however, in this particular circumstance, the credibility of the arresting officer is in doubt.

Based on the testimony during the hearing it was clear that the arresting officer's narrative statement in the probable cause document was misleading as it stated that Mr. Beyer failed the field sobriety tests when in fact he had not failed the field sobriety tests. He completed the one-leg stand, and if you look at the video, there seems to be no real swaying. In fact, its doubtful that one would call Mr. Beyer's movements "swaying".

With regard to the horizontal gaze nystagmus, its questioned whether the arresting officer

169

MOTION TO STRIKE  
BREATH TEST

-5-

AGENCY RECORD

133

did the field sobriety tests correctly. Based on the video, the arresting officer is shorter than Mr. Beyer, and his placement of the stimulus was incorrect. It is doubtful that his stimulus was twelve to fifteen inches away from Mr. Beyer's eyes. He didn't complete the passes correctly.

In addition, one has to wonder why the officer didn't put all the information regarding the "detention" and "refusal", along with the "arrest", and then the waiting of the 15 minute period in his report.

One also has to question the ethics of a arresting officer who threatens a driver with physical violence. The hearing officer may wonder what Counsel means by this. No arresting officer gets to threaten a driver who has refuted a breath test with the comments like "being stuck with a needle" for a blood test. Trooper Talbott used that sort of language twice to describe a blood draw. This description is incorrect and threatening. It is obvious what the intent of the trooper was at this time.

With regard of the cause for the stop, the Trooper said his video camera didn't turn on until after the alleged bad driving had occurred. Clearly from the video, the Trooper's camera was on long before the alleged bad driving as you can see the Trooper driving down Airway Avenue prior to his stop at Thain. Mr. Beyer was asked, on the video, on a couple of different occasions about the stop, Mr. Beyer denied violating the law by driving into the improper lane. The Trooper had the ability to view his video and his reports prior to the hearing.

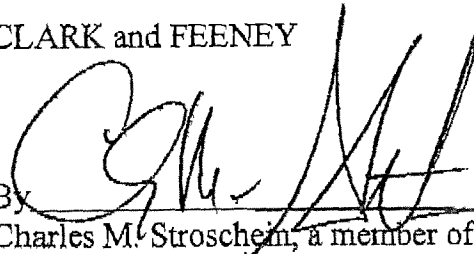
MOTION TO STRIKE

AGENCY RECORD

The hearing officer could draw a couple of conclusions from the evidence in this case. One, that the Trooper simply does sloppy work and doesn't recollect, even though he has reviewed things shortly before he testifies. Or two, that the Trooper says and does things to manipulate the record for the benefit of his arrest. There is absolutely no reason not to know what the video shows considering he had the opportunity to review right before the hearing. There is no reason to make threatening comments regarding being stuck with a needle in a DUI case that has no aggravating circumstances in it. One has to wonder why a law enforcement officer wouldn't put the complete facts of the case into his written declaration regarding detention, arrest, and the like. It is clear that credibility is at issue. The hearing officer should believe Mr Beyer's rendition of the facts and should strike the breath test based on the fact that the 15 minute wait was not complied with. The arresting law enforcement officer's senses were distracted by the arrival of the tow truck. Trooper Tallbot failed to get verification from Mr. Beyer that he had not burped, belched or the like prior to the breath test.

DATED this 7 day of December, 2010.

CLARK and FEENEY

By   
Charles M. Stroschein, a member of the firm.  
Attorneys for Respondent.

**CLARK and FEENEY**

THE TRAIN STATION, SUITE 106  
1229 MAIN STREET  
P.O. DRAWER 285  
LEWISTON, IDAHO 83501

TELEPHONE: (208) 743-9516  
FAX: (208) 746-9160

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FAX COVER SHEET

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DATE: December 2, 2010  
FROM: CHARLES M. STROSCHEIN  
TO: ERIC G. MOODY  
IDAHO TRANSPORTATION DEPT  
FAX NO. (208) 332-2002  
RE: George J. Beyer

Please see attached.

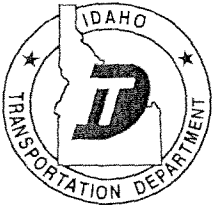
TOTAL NO OF PAGES (INCLUDING THIS COVER PAGE): \_\_\_\_\_

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**IDAHO TRANSPORTATION DEPARTMENT**

Driver Services • P.O. Box 7129

Boise ID 83707-1129

10014

(208) 334-8735

dmv.idaho.gov

PHONE: (208) 334-8736

BEYER, GEORGE JACOB JR

NOVEMBER 18, 2010

1510 ALDER DR

LEWISTON

ID 83501

LIC/IDENT NO:

FILE NUMBER:

DATE OF BIRTH:

**NOTICE OF TELEPHONE HEARING**

A HEARING WILL BE HELD PURSUANT TO YOUR REQUEST REGARDING THE ADMINISTRATIVE LICENSE SUSPENSION DATED NOVEMBER 06, 2010 . THE HEARING WILL BE CONDUCTED BY TELEPHONE CONFERENCE CALL ON DECEMBER 01, 2010 AT 3:00MT . THE TELEPHONE CALL WILL BE PLACED TO:

( ) YOU, AT TELEPHONE #:

(XXX) YOUR ATTORNEY: CHARLES STROSCHEIN

AT TELEPHONE #: 208 743-9516

THE HEARING OFFICER PRESIDING AT THE HEARING WILL BE ERIC MOODY

\*\*\*\*\*  
\* YOU HAVE 7 DAYS FROM THE DATE OF THIS NOTICE TO REQUEST A \*  
\* CONTINUANCE FOR GOOD CAUSE SHOWN. FAILURE TO REQUEST A \*  
\* CONTINUANCE WITHIN 7 DAYS MAY RESULT IN THE DENIAL OF REQUEST. \*  
\*\*\*\*\*

THE HEARING OFFICER WILL TAKE JUDICIAL NOTICE OF THE RECORDS REGULARLY MAINTAINED BY THE IDAHO TRANSPORTATION DEPARTMENT, THE IDAHO ADMINISTRATIVE PROCEDURE ACT RULES, ALL MANUALS ADOPTED UNDER IDAPA RULES 11.03.01 AND 39.02.72, IDAHO STATUTES, AND REPORTED IDAHO COURT DECISIONS.

THE HEARING WILL BE CONDUCTED ACCORDING TO THE PROVISIONS OF TITLE 67, CHAPTER 52, IDAHO CODE, AND THE RULES OF PRACTICE AND PROCEDURES OF THE IDAHO TRANSPORTATION DEPARTMENT. IF YOU NEED FURTHER ASSISTANCE, PLEASE CALL (208) 332-2005.

CC: CHARLES STROSCHEIN

**COPY**

173

**IMPORTANT!**  
**INFORMATION ABOUT YOUR TELEPHONE HEARING**

- THE IDAHO TRANSPORTATION DEPT., ADMINISTRATIVE HEARING UNIT'S PHONE NUMBER IS (208) 332-2004. THE FAX NUMBER IS (208) 332-2002. THE MAILING ADDRESS IS PO BOX 7129, BOISE ID 83707-1129.
- The Hearing is YOUR chance of presenting witnesses and giving evidence before the Department. The Hearing also provides you or your attorney an opportunity to appeal. To stop the suspension YOU must demonstrate to the Hearing Officer by a preponderance of the evidence that:
  1. The peace officer did not have legal cause to stop you.
  2. The peace officer did not have legal cause to believe you were driving or in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provision of Section 18-8004, 18-8004C, or 18-8006 Idaho Code.
  3. The evidentiary test did not show an alcohol concentration or presence of drugs or other intoxicating substances in violation of Section 18-8004, 18-8004C or 18-8006 Idaho Code.
  4. The test for alcohol, drugs or other intoxicating substances was not conducted in accordance with the requirements of Section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered.
  5. You were not informed of the consequences of submitting to evidentiary testing.
- If you have not provided a telephone number at which you can be reached, or the number contained in the notice is wrong, or if you have a number that is more convenient for you, notify the Administrative Hearing Unit at (208) 332-2004. If you fail to provide a phone number for the given time and date contained in the Notice of Hearing, it will be concluded that you failed to attend the hearing and the matter may be decided in your absence. All hearings will be recorded.
- If you need assistance to participate in the hearing because of speech, hearing, language, or other special needs, immediately contact the Administrative Hearing Unit at (208) 332-2004. Necessary arrangements can be made to assist you.
- The Administrative Hearing must be held within twenty (20) days of the receipt of the Request for Hearing. However, upon showing good cause, the Hearing Officer may grant an extension of up to ten (10) additional days in which to hold the hearing. Any extensions shall not stay the suspension, or the duration of your temporary permit (if one was issued).
- Documents to be presented to the Hearing Officer at the hearing for his consideration are enclosed with this hearing notice. Any additional relevant documents received by the department after this initial notice will be mailed to you. You have a right to object to the inclusion of any documents into the hearing record. The Hearing Officer will make the final determination. You also have the right to submit other documents to the Hearing Officer for consideration. These documents must be provided prior to the hearing.
- An attorney or other adult representative may represent you at the hearing, but representation is not required. It is your responsibility to arrange for any type of representation.
- If you intend to call witnesses, it is your responsibility to have those witnesses available on the date and time of the hearing. The law does not require the arresting officer to be present at the hearing unless subpoenaed.
- If your witnesses are unwilling to participate voluntarily, or documents are not provided voluntarily, you may submit a request to the Hearing Officer that a subpoena be issued. Please mail or fax any requests for subpoenas to the information provided above. This should include the name of the witness and any documents or records in possession of the witness you wish to be produced. Upon issuance of the subpoena by the Hearing Officer, you will be responsible to serve the subpoena to the witness at least 72 hours prior to the hearing and provide a certificate of service to the Hearing Officer prior to the hearing date. You may be required to pay in advance, if demanded, witness fees and travel fees in accordance with Idaho Civil Procedures.
- Hearings are conducted in an informal but orderly manner. All testimony is taken under oath or affirmation. The Hearing Officer has the sole authority for the conduct of the hearing and will:
  1. Explain the issues and the meaning of terms that are not clearly understood.
  2. Explain the order in which you will testify, ask questions or offer rebuttal.
  3. Assist you in asking questions of other witnesses.
  4. Question you and witnesses to obtain relevant facts.
  5. Determine if testimony and documents being offered are relevant.
  6. Maintain control of the hearing so it will progress in an orderly manner that protects your rights.
  7. Issue a written decision following the hearing.
- Your rights in a hearing are:
  1. To have a representative.
  2. To testify.
  3. To present witnesses and documents.
  4. To question witnesses.
  5. To respond to the evidence presented.
  6. To make a brief statement of your position at the end of the hearing.
- You may petition for the disqualification of the assigned Hearing Officer and have a new one appointed if you have cause to believe that the assigned officer is bias, prejudiced or for some reason unable to give you a fair hearing on the matter. The petition must be sent to the Administrative Hearing Unit office. Your suspension shall not be stayed if such a petition results in the delay of the hearing.
- If you wish to cancel your hearing, your request must be mailed or faxed to the information provided above. Failure to do so will result in the hearing proceeding as scheduled and a default finding being made in your absence.
- If you need to request a continuance or reschedule the hearing. The request must be mailed or faxed to the information provided above prior to the hearing date. If the hearing cannot be held within 30 days from the date of service you will need to include a statement in your request that says you acknowledge that the hearing will not be held within the 30 day statutory time, and that you are aware that your suspension will remain in effect.

174

138

# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-18-2010  
93322002

11:57:08 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

**DRIVER SERVICES**  
**ADMINISTRATIVE HEARING SECTION**  
**PO BOX 7129**  
**BOISE ID 83707**  
**PHONE: 208 332-2005**  
**FAX: 208 332-2002**

**ADMINISTRATIVE  
HEARING SECTION**

## Fax

**To: CHARLES STROSCHEIN**      **From: CALLIE**  
**Fax: 746-9180**      **Date: November 18, 2010**  
**Phone:**      **Pages: 2**  
**Re: CIVIL SUBPOENA REQUEST**      **CC:**  
**FOR GEORGE JACOB BEYER**  
**JR'S A.L.S. HEARING**

Comments:

### **\*\*IMPORTANT INFORMATION\*\***

Attached, please find the Subpoena that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena must be served **at least 72 hours prior to the hearing**. Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

173

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	397	208-746-9160	11:55:34 a.m. 11-18-2010	00:00:58	2/2	1	G3	HS	CP14400

#### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

AGENCY RECORD  
PC: Polled local  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

139



# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-18-2010  
93322002

11:58:04 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

DRIVER SERVICES  
ADMINISTRATIVE HEARING SECTION  
PO BOX 7129  
BOISE ID 83707  
PHONE: 208 332-2005  
FAX: 208 332-2002

**ADMINISTRATIVE  
HEARING SECTION**

## Fax

To: CHARLES STROSCHER

From: CALLIE

Fax: 746-9160

Date: November 18, 2010

Phone:

Pages: 2

Re: SUBPOENA DUCES TECUM

CC:

REQUEST FOR THE LIFELOC

CERTIFICATION FOR GEORGE

JACOB BEYER JR'S A.L.S.

HEARING

Comments:

### \*\*\*\*\*IMPORTANT INFORMATION\*\*\*\*\*

Attached, please find the Subpoena Duces Tecum that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena **MUST BE SERVED WITHIN 72 HOURS OF ISSUANCE** Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	398	208-746-9160	11:55:43 a.m. 11-18-2010	00:00:56	2/2	1	G3	HS	CP14400

#### Abbreviations:

HS: Host send AGENCY RECORD

HR: Host receive

WS: Waiting send

PR: Polled remote

MS: Mailbox save

MP: Mailbox print

CP: Completed

FA: Fail

TU: Terminated by user

TS: Terminated by system

RP: Report

G3: Group 3

EC: Error Correct

176

140

# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-18-2010  
93322002

11:59:02 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

**DRIVER SERVICES**  
**ADMINISTRATIVE HEARING SECTION**  
**PO BOX 7129**  
**BOISE ID 83707**  
**PHONE: 208 332-2005**  
**FAX: 208 332-2002**

**ADMINISTRATIVE  
HEARING SECTION**

## Fax

**To: CHARLES STROSCHEIN** **From: CALLIE**  
**Fax: 746-9160** **Date: November 18, 2010**  
**Phone:** **Pages: 2**  
**Re: SUBPOENA DUCES TECUM** **CC:**  
**REQUEST FOR AUDIO AND**  
**VIDEO FOR GEORGE JACOB**  
**BEYER JR'S A.L.S. HEARING**

Comments:

### \*\*\*\*\*IMPORTANT INFORMATION\*\*\*\*\*

Attached, please find the Subpoena Duces Tecum that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena **MUST BE SERVED WITHIN 72 HOURS OF ISSUANCE** Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	399	208-746-9160	11:55:53 a.m. 11-18-2010	00:00:58	2/2	1	G3	HS	CP14400

#### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

AGENCY RECORD  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

177

141

# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-18-2010  
93322002

11:59:50 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

## IN THE IDAHO TRANSPORTATION DEPARTMENT STATE OF IDAHO

In the Matter of the  
Driving Privileges of  
GEORGE JACOB BEYER JR

) File No. 648000035832  
) D.L. No. JA363481B  
)  
) ORDER

The petitioner submitted a Motion for Discovery Order to the Hearing Examiner on November 12, 2010. The Hearing Examiner, having reviewed the Administrative License Suspension file and considered the Motion for Discovery Order and Request for Discovery and being advised in the premises and the law, hereby denies the petitioner's motion.

The Idaho Rules of Administrative Procedure of the Attorney General (IDAPA 04.11.01) Rule 521 provides that no party to an administrative proceeding is authorized to engage in discovery unless through agreement of the parties, discovery is authorized by the agency or upon order of the Hearing Examiner. The agency has not authorized any additional discovery.

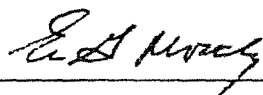
The Rules Governing Administrative License Suspensions (IDAPA 39.02.72) Rule 400.01 provides that upon written request, the Department will provide to the Respondent records relating to the hearing "in the possession of the Department." It is the standard procedure of the Department to supply all documents and records to be submitted at the hearing of the matter to the Respondent in advance of the hearing.

It is clear from the limited time frames in which the administrative hearings must be held under I.C. § 18-8002A, that the legislature intended only limited discovery in these proceedings.

The request for Discovery exceeds the scope of what is required for the conduct and defense of the administrative hearing as outlined in I.C. § 18-8002A and seeks material and information not in the possession or under the control of the Department of Transportation.

The Department has complied with the petitioner's request for discovery regarding the information held by the Department and relevant to the Petitioner's hearing.

DATED this 18<sup>th</sup> day November of 2010.

  
Eric G. Moody  
Hearing Examiner

ORDER- 1

Total Pages Scanned : 2

Total Pages Confirmed : 2

178

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	400	208-746-9160	11:56:02 a.m. 11-18-2010	00:00:49	2/2	1	G3	H5	CP14400

### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

AGENCY RECORD  
LC: Local  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

142

# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-18-2010  
93322002

12:00:36 p.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

## IN THE IDAHO TRANSPORTATION DEPARTMENT

### STATE OF IDAHO

IN THE MATTER OF THE  
DRIVING PRIVILEGES OF:

FILE # 648000035832  
D. L. # JA363481B

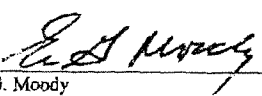
GEORGE JACOB BEYER JR

ORDER

The Petitioner submitted a request for an in-person administrative hearing to the Hearing Examiner on November 12, 2010. The Hearing Examiner, having reviewed Idaho Code §18-8002A and considered the request for an in-person administrative hearing, and being advised in the premises and the law, hereby denies the Petitioner's request.

Idaho Code §18-8002A(7) provides that the Department may conduct all hearings by telephone if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place. Due process requires the opportunity to be heard, not the opportunity to be heard in person. Based on the exhibits presented by the licensee, and without any evidence of any parties having difficulty in participating in the entire proceeding, the Petitioner has presented insufficient evidence to demonstrate why the hearing should not take place by telephone conference call. The Department has complied with all statutory requirements pursuant to Idaho Code §18-8002A, and it is determined that the hearing on the Administrative License Suspension of George Jacob Beyer Jr shall be conducted by telephone conference on December 1, 2010, at 3:00pm MST.

Dated, this 18<sup>th</sup> day of November, 2010.

  
Eric G. Moody  
HEARING EXAMINER

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	401	208-746-9160	11:56:12 a.m. 11-18-2010	00:00:45	2/2	1	G3	H5	CP14400

#### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

AGENCY RECORD  
EC: Error Corrected  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fall

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-18-2010  
93322002

12:01:11 p.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

## IN THE IDAHO TRANSPORTATION DEPARTMENT STATE OF IDAHO

In the Matter of the )  
Driving Privileges of ) File No. 648000035832  
 ) D.L. No. JA363481B  
GEORGE JACOB BEYER JR )  
 ) ORDER  
\_\_\_\_\_ )

Idaho Code §18-8002A(7) allows for a subpoena to be issued by the hearing examiner ordering the appearance of the arresting officer, and IDAPA 39.02.72.300.01 provides for issuance of a subpoena for tangible evidence. The Hearing Examiner has issued subpoenas for the evidence he deems relevant. All other subpoena requests are hereby denied.

DATED this 18<sup>th</sup> day of November 2010.



Eric G. Moody  
Hearing Examiner

ORDER- 1

180

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	402	208-746-9160	11:56:21 a.m. 11-18-2010	00:00:37	2/2	1	G3	HS	CP14400

### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

144

## Callie Downum

---

**From:** Callie Downum  
**Sent:** Thursday, November 18, 2010 11:01 AM  
**To:** Charles Stroschein(cmssecretary@clarkandfeeney.com)  
**Subject:** A.L.S. HEARING PACKET FOR: GEORGE JACOB BEYER JR  
**Attachments:** DOC001.PDF  
  
**Importance:** High

# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-23-2010  
93322002

01:33:21 p.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

**DRIVER SERVICES**  
**ADMINISTRATIVE HEARING SECTION**  
**PO BOX 7129**  
**BOISE ID 83707**  
**PHONE: 208 332-2005**  
**FAX: 208 332-2002**

**ADMINISTRATIVE  
HEARING SECTION**

## Fax

To: CHARLES STROSCHEIN

From: CALLIE

Fax: 746-9160

Date: November 23, 2010

Phone:

Pages: 4

Re: LIFELOC

CC:

**CERTIFICATION FOR:**  
**GEORGE JACOB BEYER**  
**JR A.L.S. HEARING**

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Comments:

182

Total Pages Scanned : 4

Total Pages Confirmed : 4

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	538	208-746-9160	01:31:01 p.m. 11-23-2010	00:01:43	4/4	1	G3	HS	CP14400

### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

146



**IDAHO TRANSPORTATION DEPARTMENT**

Driver Services • P.O. Box 7129  
Boise ID 83707-1129

10014  
(208) 334-8735  
dmv.idaho.gov

PHONE: (208) 334-8736

BEYER, GEORGE JACOB JR

DECEMBER 02, 2010

1510 ALDER DR  
LEWISTON

ID 83501

LIC/IDENT NO: JA363481B  
FILE NUMBER: 648000035832  
DATE OF BIRTH: 02-22-1969

**PENDING ACTION**

THIS IS TO NOTIFY YOU THAT EFFECTIVE 08:15 A.M. DECEMBER 02, 2010 ,  
THE WITHDRAWAL PERIOD FOR:  
ADMIN LIC SUSP BAC .08+/DRUGS/INTOX SUBS I.C. 18-8002A

IS TEMPORARILY STOPPED:

PENDING ADMINISTRATIVE HEARING AND HEARING OFFICERS DECISION

YOUR CLASS D DRIVING PRIVILEGES ARE CLEAR UNLESS OTHERWISE NOTIFIED.  
THE ORIGINAL WITHDRAWAL DATES ARE NO LONGER VALID. IN THE EVENT THE  
WITHDRAWAL IS RE-ENFORCED, CORRECTED DATES WILL BE ISSUED WITH CREDIT  
GIVEN FOR ANY TIME SPENT UNDER WITHDRAWAL.

LICENSE ENCLOSED

**COPY**

183

AGENCY RECORD

FORM 030

10014

147



# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

12-02-2010  
93322002

09:27:29 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

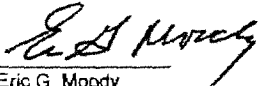
In the Matter of the  
Driving Privileges of  
GEORGE JACOB BEYER JR

)  
)  
)  
)  
)  
D.L. No. JA363481B  
FILE No. 648000035832  
STAY  
ORDER

Pursuant to Title 67, Idaho Code, and IDAPA rule 04.11.01 the Idaho Transportation Department is hereby ordered to stay George Jacob Beyer Jr Idaho Code §18-8002A suspension effective the 2<sup>nd</sup> day of December 2010. The suspension shall be stayed indefinitely pending the administrative hearing and the written Findings of Fact and Conclusions of Law and Order. The petitioner is advised that the suspension shall be effective, unless otherwise ordered by the hearing examiner, and shall run for a period of 90 days from said date.

This stay shall not set precedent for stays in future Administrative License Suspension Hearings.

DATED this 2<sup>nd</sup> day of December 2010.

  
Eric G. Moody  
Hearing Examiner

STAY ORDER - 1

Total Pages Scanned : 3

Total Pages Confirmed : 3

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	709	208-746-9160	09:25:49 a.m. 12-02-2010	00:01:05	3/3	1	G3	HS	CP14400

## Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

## AGENCY RECORD

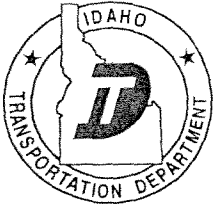
PL: Polled local  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

148



**IDAHO TRANSPORTATION DEPARTMENT**  
Driver Services • P.O. Box 7129  
Boise ID 83707-1129

10014  
(208) 334-8735  
dmv.idaho.gov

PHONE: (208) 334-8736

BEYER, GEORGE JACOB JR

DECEMBER 02, 2010

1510 ALDER DR  
LEWISTON

ID 83501

LIC/IDENT NO: [REDACTED]

**REQUEST FOR ADDITIONAL TIME FOR EVIDENCE**

AN ADMINISTRATIVE HEARING WAS HELD ON DECEMBER 01, 2010 , AND A MOTION/REQUEST WAS MADE TO LEAVE THE RECORD OPEN TO ALLOW TIME TO OBTAIN AND PRESENT ADDITIONAL EVIDENCE. THE HEARING OFFICER GRANTED THE MOTION/REQUEST AND THE RECORD WILL BE HELD OPEN FOR 15 DAYS FROM THE DATE THE HEARING WAS HELD. THE MOTION/REQUEST SHALL NOT STAY THE SUSPENSION NOR EXTEND THE EXPIRATION DATE OF THE THIRTY (30) TEMPORARY PERMIT.

IF THE ADDITIONAL EVIDENCE IS RECEIVED PRIOR TO THE EXPIRATION OF THE 15 DAY TIME FRAME, THE RECORD WILL BE CLOSED AT THE TIME THE EVIDENCE IS RECEIVED AND A FINDING OF FACT WILL BE ISSUED.

IF THE ADDITIONAL EVIDENCE IS NOT RECEIVED WITHIN THE 15 DAY TIME FRAME, THE RECORD WILL BE CLOSED AND A FINDING OF FACT WILL BE ISSUED. IF THE EVIDENCE CANNOT BE OBTAINED WITHIN 15 DAYS, PLEASE CONTACT OUR OFFICE PRIOR TO THE EXPIRATION OF THE 15 DAYS TIME FRAME AT (208) 332-2004 TO REQUEST ADDITIONAL TIME TO OBTAIN THE EVIDENCE.

**COPY**

103

AGENCY RECORD

FORM 02J

10014

149

# Transmission Report

Date/Time  
Local ID 1  
Local ID 2

12-02-2010  
93322002

09:34:52 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"



IDAHO TRANSPORTATION DEPARTMENT  
Driver Services • P.O. Box 7129  
Boise ID 83707-1129

10014  
(208) 334-8735  
dmv.idaho.gov

PHONE: (208) 334-8736

BEYER, GEORGE JACOB JR

DECEMBER 02, 2010

1510 ALDER DR  
LEWISTON

ID 83501

LIC/IDENT NO: JA363461B  
FILE NUMBER: 648000035832  
DATE OF BIRTH: 02-22-1969

## REQUEST FOR ADDITIONAL TIME FOR EVIDENCE

AN ADMINISTRATIVE HEARING WAS HELD ON DECEMBER 01, 2010 , AND A MOTION/REQUEST WAS MADE TO LEAVE THE RECORD OPEN TO ALLOW TIME TO OBTAIN AND PRESENT ADDITIONAL EVIDENCE. THE HEARING OFFICER GRANTED THE MOTION/REQUEST AND THE RECORD WILL BE HELD OPEN FOR 15 DAYS FROM THE DATE THE HEARING WAS HELD. THE MOTION/REQUEST SHALL NOT STAY THE SUSPENSION NOR EXTEND THE EXPIRATION DATE OF THE THIRTY (30) TEMPORARY PERMIT.

IF THE ADDITIONAL EVIDENCE IS RECEIVED PRIOR TO THE EXPIRATION OF THE 15 DAY TIME FRAME, THE RECORD WILL BE CLOSED AT THE TIME THE EVIDENCE IS RECEIVED AND A FINDING OF FACT WILL BE ISSUED.

IF THE ADDITIONAL EVIDENCE IS NOT RECEIVED WITHIN THE 15 DAY TIME FRAME, THE RECORD WILL BE CLOSED AND A FINDING OF FACT WILL BE ISSUED. IF THE EVIDENCE CANNOT BE OBTAINED WITHIN 15 DAYS, PLEASE CONTACT OUR OFFICE PRIOR TO THE EXPIRATION OF THE 15 DAYS TIME FRAME AT (208) 332-2004 TO REQUEST ADDITIONAL TIME TO OBTAIN THE EVIDENCE.

COPY

FORM 02J

10014

186

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	711	208-746-9160	09:33:29 a.m. 12-02-2010	00:00:50	2/2	1	G3	HS	CP14400

### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

### AGENCY RECORD

PL: Polled local  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

150

**Eric Moody**

---

**From:** Eric Moody  
**Sent:** Thursday, December 23, 2010 2:25 PM  
**To:** 'cmssecretary@clarkandfeeney.com'  
**Subject:** Beyer ALS

Mr. Stroschein,

Attached is a copy of the Beyer ALS decision.



BEYER,  
GEORGE.doc

Eric G. Moody  
Hearing Officer

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\*\*\*CONFIDENTIALITY NOTICE: This e-mail message may contain legally privileged and confidential information exempt or prohibited from disclosure under applicable law. If you are not the intended recipient of this e-mail, please notify this sender immediately and do not deliver, distribute or copy this e-mail, or disclose its contents or take any action in reliance on the information it contains.

187

AGENCY RECORD

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

IN THE MATTER OF THE	)	IDAHO D.L. No.JA363481B
DRIVING PRIVILEGES OF	)	FILE No. 648000035832
	)	
	)	<b>FINDINGS OF FACT AND</b>
<b>GEORGE JACOB BEYER JR.</b>	)	<b>CONCLUSIONS OF LAW AND</b>
	)	<b>ORDER</b>
_____	)	

This matter came on for Administrative License Suspension (ALS) hearing on December 01, 2010, by telephone conference. Charles Stroschein, Attorney at Law, represented Beyer.

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A\* is **SUSTAINED.**

**EXHIBIT LIST<sup>†</sup>**

The hearing examiner received the following exhibits into evidence as part of the record of the proceeding:

1. Notice of suspension and temporary permit
2. Evidentiary test results
3. Instrument operations log
4. Sworn statement
5. Influence report
6. Copy of citation number 35832
7. Copy of petitioner's driver's license
8. Envelope from law enforcement agency

AGENCY RECORD

9. Certificate of receipt of law enforcement documents
10. Petitioner's hearing request
11. Petitioner's request for subpoenas
12. Petitioner's notice of appearance
13. Petitioner's motion for discovery order
14. Petitioner's driving record
15. Subpoena-civil
16. Subpoena-duces tecum
17. Subpoena-duces tecum
18. Order
19. Order
20. Order

- A. Portable breath testing instrument inspection/certification
- B. DVD
- C. Motion to suppress
- D. ISP Forensic Services SOP revised 11-1-10
- E. IDAPA Rule 11.03.0
- F. ISP SOP revised 8-2-10
- G. History page
- H. Stay Order
- I. Correspondence
- J. Post employee profile
- K. State of WA v. Fausto and Ballow
- L. Motion to strike breath test

**THE HEARING EXAMINER HAS TAKEN JUDICIAL NOTICE OF THE  
FOLLOWING ITEMS:**

1. Records regularly maintained by ITD<sup>+</sup>
2. IDAPA<sup>§</sup> Rules and manuals
3. ISP<sup>\*\*</sup> standards and procedures<sup>††</sup> for breath testing instruments

AGENCY RECORD

189

153

4. Idaho Statutes, city, and county ordinances and procedures
5. Reported Court Decisions
6. NHTSA<sup>††</sup> driving while impaired and SFSTs<sup>§§</sup> testing manual

### **ADMINISTRATIVE PROCEEDINGS<sup>\*\*\*</sup>**

Trooper Jeffory R. Talbott testified:

1. Beyer's vehicle was observed making an illegal right turn.
2. The illegal turn is not indicate on the DVD.
3. Times in the record are based upon his watch.
4. Beyer failed two of the three SFSTs.
5. Beyer did not fail the one leg stand SFST.
6. Beyer was detained and not arrested.
7. Beyer was placed in the patrol vehicle's back seat.
8. Beyer was not handcuffed and his feet were hanging outside of the passenger door.
9. Beyer's mouth was checked for foreign material prior to start of the monitoring period.
10. Stood within two to three feet away from of Beyer.
11. Beyer stated he was not going to give a breath sample.
12. Beyer was informed about submitting to a blood test.
13. Beyer was arrested and handcuffed.
14. A few minutes later, Beyer said he would take a breath test.
15. Restarted Beyer's monitoring period.
16. Stood next to Beyer during the second monitoring period.
17. The monitoring period was approximately 15 minutes and 30 seconds.

Beyer testified:

1. Drove into the right lane and then merged into the left lane of travel.

Mr. Stroschein's final comments and arguments:

1. Exhibit 4 notes Idaho Department of Law Enforcement (IDLE).

AGENCY RECORD

190

154

2. There has not been an IDLE for more than ten years.
3. In 2008, the Lifeloc FC20 was approved in Idaho as a breath-testing instrument.
4. ISP not IDLE approved the Lifeloc FC20's methods and standards.
5. Idaho Code §18-8004(4) requires a laboratory for evidentiary testing.
6. ISP Forensic Services failed to comply with this statutory requirement.
7. This proceeding should be vacated pursuant to Idaho Code §18-8002A(7)(d), since Trooper Talbott did not state he followed ISP standards.
8. Pursuant to case law, a monitoring period cannot occur while the driver is in the back seat of a patrol vehicle especially when the police officer is distracted on other things.
9. The Lifeloc FC20 training requires a time when the fifteen-minute monitoring period started.
10. Based upon the times noted in the record, impossible for a fifteen-minute monitoring period to occur.

### **FINDINGS OF FACT**

I, having heard the testimony; having heard the issues raised by the driver; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact:

**PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER HAS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ALL ISSUES RAISED BY THE PETITIONER.**



**1.**

**DID TROOPER TALBOTT HAVE LEGAL CAUSE TO STOP THE VEHICLE  
BEYER WAS DRIVING?**

1. Trooper Talbott observed the vehicle driven by Beyer fail to turn into the correct lane of travel as required by Idaho Code §49-644.
2. Although the traffic violation is not shown in Exhibit B, Exhibit B demonstrates Trooper Talbott had explained to Beyer how he illegally made the turn.
3. Pursuant to Idaho Code §18-8002A(7) Beyer bears the burden of proof by the preponderance of the evidence.
4. Beyer's testimony is given the same weight as given to Trooper Talbott's live testimony and sworn statement.
5. Because Beyer's testimony and Trooper Talbott's live testimony and sworn statement are equally contradictory, as required by Idaho Code, Beyer must provide evidence to support his position.
6. Beyer's testimony alone in this case does not outweigh Trooper Talbott's live testimony or sworn statement.
7. Beyer did not meet his burden of proof.
8. Trooper Talbott had legal cause to stop the vehicle driven by Beyer.

**2.**

**DID TROOPER TALBOTT HAVE LEGAL CAUSE TO BELIEVE BEYER  
VIOLATED IDAHO CODE §18-8004?**

1. Trooper Talbott observed Beyer driving a motor vehicle.
2. Beyer exhibited the following behaviors:
  - a. Smelled of an alcoholic beverage
  - b. Admitted to consuming alcoholic beverages
  - c. Glassy eyes
  - d. Bloodshot eyes
3. Beyer met or exceeded the minimum decision points on the horizontal gaze nystagmus and the 9-step walk and turn SFSTs.

192

AGENCY RECORD

4. Since Beyer failed **two** (plural) of the **three** SFSTs, Exhibit 4's narrative is correct and not ambiguous by stating Beyer *performed and failed the tests* (plural).
4. Exhibit L noted certain situations regarding the inadequacies of Trooper Talbott administering the SFSTs.
5. Even without considering the SFSTs, Trooper Talbott's observations of Beyer, as set forth in Exhibit 4's DUI NOTES are sufficient for requesting an evidentiary test from Beyer.
6. Idaho Code §18-8002A(5)(b)(v) provides the police officer's sworn statement shall state that *the person was lawfully arrested*.
7. Although Beyer was initially detained in order for him to submit to a breath test, Trooper Talbott's testimony at this ALS proceeding indicated how Beyer was lawfully arrested after Beyer refused the evidentiary breath test.
8. Trooper Talbott had sufficient legal cause to arrest Beyer and request an evidentiary test.

### **3.**

#### **DID THE EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §§18-8004, 18-8004C, OR 18-8006?**

1. The analyses of Beyer's breath samples indicated a BrAC<sup>+++</sup> of insufficient/.165/.158.
2. Based upon statements Trooper Talbott made to Beyer regarding needles used for blood testing, Exhibit L provides Beyer was threatened to take a breath test.
3. Beyer did not provide any testimony to support Exhibit L's speculation.
4. Pursuant to Idaho Code §18-8002A(7) Beyer believing he was threatened to take a breath test is not one of the exclusive issues that can be raised in an ALS hearing.
5. Since the record demonstrates Beyer submitted to and failed a breath test, Beyer was in violation of Idaho Code §18-8004.

AGENCY RECORD

193

157

**4.**

**WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE AND ISP FORENSIC SERVICES SOPs?**

1. Trooper Talbott's affidavit states the evidentiary test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.
2. The standard language in Trooper Talbott's sworn statement (Exhibit 4) does state Department of Law Enforcement (DLE) and not Idaho State Police (ISP).
3. As of July 1, 2000, DLE's name was changed to Idaho State Police.
4. With DLE and ISP being the same, the record is accurate and in compliance with statute in setting forth the proper authority.
5. Since DLE and ISP are one of the same, the Hearing Examiner can infer that Exhibit 3's boilerplate language refers to ISP just as it did to DLE prior to July 1, 2000.
6. It can also be inferred that since DLE is now ISP, the Lifeloc FC20 is an acceptable and approved breath-testing instrument within the state of Idaho and was properly used to test Beyer's breath sample.
7. ISP Forensic Services SOP § 6 requires a driver to be monitored for fifteen minutes prior to an evidentiary breath test.
8. Beyer argued he was not properly monitored based upon the times in the record and the area where Trooper Talbott was located during the monitoring period.
9. Based upon the times noted in Exhibit B, Beyer was monitored for at least fifteen minutes prior to his breath test (see Exhibit B from 02:43:29 to Beyer's first attempt at blowing into the Lifeloc FC20 at 02:59.01).
10. Unlike what is stated in Exhibit L, Exhibit B shows Beyer was warned not to burp, vomit, or regurgitate.
11. Pursuant to ISP Forensic Services SOP § 6, a police officer is not required to state this warning to a driver prior to the monitoring

period.

12. After the warning and prior to Beyer's breath test, Exhibit B does not set forth Beyer did anything or admitting to do anything that would have skewed his breath test results during the monitoring period.
13. After the start of the monitoring period and while Trooper Talbott was outside and next to Beyer, Exhibit B demonstrates Trooper Talbott continuously communicated with Beyer.
14. State vs. Remsburg (126 Idaho 340) states that during the observation period, the operator of a breath testing instrument does not need to stare continuously at the driver for the full fifteen minute monitoring period.
15. Remsburg further provides that the level of surveillance by the police officer of the driver during the observation must in the police officer's mind accomplish the requirements set forth in ISP Forensic Services SOP Section 6.
16. Trooper Talbott's testimony lacks any statement that he was unable to monitor Beyer as required by ISP Forensic Services SOP § 6.
17. Even when Trooper Talbott's attention was diverted to other situations during the monitoring period (including Trooper Talbott yelling to a tow truck driver for less than 8 seconds) Exhibit B and additionally Beyer failed to provide any proof that Trooper Talbott's other senses than sight were unable to assist in monitoring Beyer.
18. Added assumptions were made in Exhibit L regarding outside influences affecting Beyer's monitoring period.
19. However, Beyer did not offer testimony at this ALS hearing to support what is noted in Exhibit L nor has he submitted any proof by the preponderance of the evidence to back these assumptions.
20. Upon review of the Lifeloc FC20's manual and ISP Forensic Services SOPs, there is no mandate for the operator of a breath-testing instrument to indicate a time when the monitoring period commences on the duplicate printout from a breath-testing instrument.

21. Beyer's evidentiary test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.

## **5.**

### **DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY WHEN THE TEST WAS ADMINISTERED?**

1. The evidentiary breath-testing instrument used to test Beyer's breath sample completed a valid performance verification check at 04:20 hours on November 06, 2010.
2. The valid performance verification check approved the instrument for evidentiary testing in accordance with ISP Forensic Services SOP.
3. The evidentiary testing instrument functioned properly when the test was administered.

## **6.**

### **WAS BEYER ADVISED OF THE POSSIBLE SUSPENSION OF HIS IDAHO DRIVING PRIVILEGES?**

1. Beyer was played the Idaho Code §§18-8002 and 18-8002A advisory recording prior to submitting to the evidentiary test.
2. Beyer was advised of the consequences of refusing or failing evidentiary testing pursuant to Idaho Code §§18-8002 and 18-8002A.

## **7.**

### **ADDITIONAL ISSUES**

22. Exhibit I's issues of another state's "confidence interval" of breath testing instruments as provided in Exhibit K is for ISP Forensic Services to consider and address.
23. Issues noted in Exhibit K are not issues that can be raised in this ALS proceeding pursuant to Idaho Code §18-8002A(7).
24. ISP Forensic Services changing standards for breath testing instruments is a policy of another agency and the reasons for the

196

changes are unknown by me.

25. Arguments noted in Exhibit C regarding the ISP Forensic Services changes to the SOPs have been read but will not be ruled upon since such arguments cannot be address or considered in this ALS hearing pursuant to Idaho Code §18-8002A(7).

### **CONCLUSION OF LAW**


**CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT, I CONCLUDE THAT ALL OF THE REQUIREMENTS FOR SUSPENSION OF THE PETITIONER'S DRIVING PRIVILEGES SET FORTH IN IDAHO CODE §§18-8002 AND 18-8002A WERE COMPLIED WITH IN THIS CASE.**

**THE FOLLOWING ORDER IS RENDERED:**

### **ORDER**

**THE STAY ORDER IS HEREBY QUASHED AND THE SUSPENSION SET FORTH IN THE NOTICE OF SUSPENSION FOR FAILURE OF EVIDENTIARY TESTING SERVED BY TROOPER TALBOTT ON NOVEMBER 06, 2010, SHALL BE REINSTATED FOR 90 DAYS COMMENCING ON DECEMBER 29, 2010, AND REMAIN IN EFFECT THROUGH MARCH 29, 2011.**

DATED this 23<sup>rd</sup> day of December 2010

A handwritten signature in black ink, appearing to read "Eric G. Moody". The signature is fluid and cursive, with the first name "Eric" and last name "Moody" clearly distinguishable.

Eric G. Moody

ADMINISTRATIVE HEARING EXAMINER

198

## **FINAL ORDER**

(Hearings pursuant to section 18-8002A, I.C.)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one (21) days of its receipt, the motion will be deemed denied.

Alternatively, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

1. A hearing was held;
2. The final agency actions were taken; or
3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

139



## Endnotes

\*Idaho's Implied Consent Statute

<sup>†</sup>Idaho Transportation Department's (ITD hereafter) exhibits are numeric, Petitioner's exhibits are alpha

<sup>†</sup>Idaho Transportation Department

<sup>§</sup>Idaho's Administrative Procedure Act

<sup>\*\*</sup>Idaho State Police

<sup>††</sup>Hereafter SOPs

<sup>††</sup>National Highway Transportation Safety Administration

<sup>§§</sup>Standardized field sobriety tests

<sup>\*\*\*</sup>Argument and testimony is summarized from record of hearing

<sup>†††</sup>Breath Alcohol Concentration

**RECEIVED**  
 DEC 27 2010  
 DRIVER SERVICES  
 ID. TRANSPORTATION DEPT.

**COPY**

CHARLES M. STROSCHEIN  
 CLARK and FEENEY  
 Attorneys for Respondent  
 The Train Station, Suite 201  
 13th and Main Streets  
 P. O. Drawer 285  
 Lewiston, Idaho 83501  
 Telephone: (208)743-9516

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of the	)	Case No. _____
Driving Privileges of	)	IDT File No. 648000035832
	)	Idaho D. L. No. JA363481B
	)	
	)	PETITION FOR JUDICIAL REVIEW
GEORGE JAY BEYER, JR,	)	
	)	
Respondent,	)	
_____	)	

COMES NOW, GEORGE JAY BEYER, JR., the Respondent in the above-entitled matter by and through his undersigned Attorney of Record, CHARLES M. STROSCHEIN, of the firm of Clark & Feeney, and pursuant to Idaho Code Sections 18-8002A(8) and 67-5270 et seq, hereby respectfully petitions this Court for Judicial Review of the Findings of Fact and Conclusions of Law and Order entered by the Idaho Department of Transportation on December 23, 2010, in file number 648000035832. A copy of said final Order is attached

Petition for Judicial Review

1

AGENCY RECORD

hereto as Exhibit "A". Said proceeding and final Order were entered following a hearing held pursuant to Idaho Code Section 18-8002A.

DATED this 21 day of December, 2010

CLARK and FEENEY

By s/Charles M. Stroschein

Charles M. Stroschein, a member of the firm.  
Attorneys for Respondent.

I hereby certify on the 21  
day of December, 2010, a true copy  
of the foregoing instrument  
was: ☒ Mailed  
☒ Faxed  
☐ Hand delivered  
☐ Overnight mail to:

IDAHO TRANSPORTATION DEPARTMENT  
DRIVER SERVICES SECTION  
P O BOX 7129  
BOISE ID 83707

Edwin L. Litteneker  
Attorney at Law  
PO Box 321  
322 Main St.  
Lewiston, ID 83501  
CLARK and FEENEY

By s/Charles M. Stroschein  
Attorneys for Respondent

# EXHIBIT A

AGENCY RECORD

203

167

## IN THE IDAHO TRANSPORTATION DEPARTMENT

## STATE OF IDAHO

**RECEIVED**

DEC 23 2010

CHARLES M. STROSCHIN  
ATTORNEY  
208-743-9516

IN THE MATTER OF THE	)	IDAHO D.L. No. JA363481B
DRIVING PRIVILEGES OF	)	FILE NO. 648000035832
	)	
	)	<b>FINDINGS OF FACT AND</b>
<b>GEORGE JACOB BEYER JR.</b>	)	<b>CONCLUSIONS OF LAW AND</b>
	)	<b>ORDER</b>
_____	)	

This matter came on for Administrative License Suspension (ALS) hearing on December 01, 2010, by telephone conference. Charles Stroschein, Attorney at Law, represented Beyer.

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A\* is **SUSTAINED.**

**EXHIBIT LIST<sup>†</sup>**

The hearing examiner received the following exhibits into evidence as part of the record of the proceeding:

1. Notice of suspension and temporary permit
2. Evidentiary test results
3. Instrument operations log
4. Sworn statement
5. Influence report
6. Copy of citation number 35832
7. Copy of petitioner's driver's license
8. Envelope from law enforcement agency

204

9. Certificate of receipt of law enforcement documents
  10. Petitioner's hearing request
  11. Petitioner's request for subpoenas
  12. Petitioner's notice of appearance
  13. Petitioner's motion for discovery order
  14. Petitioner's driving record
  15. Subpoena-civil
  16. Subpoena-duces tecum
  17. Subpoena-duces tecum
  18. Order
  19. Order
  20. Order
- 
- A. Portable breath testing instrument inspection/certification
  - B. DVD
  - C. Motion to suppress
  - D. ISP Forensic Services SOP revised 11-1-10
  - E. IDAPA Rule 11.03.0
  - F. ISP SOP revised 8-2-10
  - G. History page
  - H. Stay Order
  - I. Correspondence
  - J. Post employee profile
  - K. State of WA v. Fausto and Ballow
  - L. Motion to strike breath test

**THE HEARING EXAMINER HAS TAKEN JUDICIAL NOTICE OF THE  
FOLLOWING ITEMS:**

1. Records regularly maintained by ITD<sup>+</sup>
  2. IDAPA<sup>§</sup> Rules and manuals
  3. ISP<sup>\*\*</sup> standards and procedures<sup>++</sup> for breath testing instruments
- AGENCY RECORD

205

169

4. Idaho Statutes, city, and county ordinances and procedures
5. Reported Court Decisions
6. NHTSA<sup>\*\*</sup> driving while impaired and SFSTs<sup>§§</sup> testing manual

### **ADMINISTRATIVE PROCEEDINGS** \*\*\*

Trooper Jeffory R. Talbott testified:

1. Beyer's vehicle was observed making an illegal right turn.
2. The illegal turn is not indicate on the DVD.
3. Times in the record are based upon his watch.
4. Beyer failed two of the three SFSTs.
5. Beyer did not fail the one leg stand SFST.
6. Beyer was detained and not arrested.
7. Beyer was placed in the patrol vehicle's back seat.
8. Beyer was not handcuffed and his feet were hanging outside of the passenger door.
9. Beyer's mouth was checked for foreign material prior to start of the monitoring period.
10. Stood within two to three feet away from of Beyer.
11. Beyer stated he was not going to give a breath sample.
12. Beyer was informed about submitting to a blood test.
13. Beyer was arrested and handcuffed.
14. A few minutes later, Beyer said he would take a breath test.
15. Restarted Beyer's monitoring period.
16. Stood next to Beyer during the second monitoring period.
17. The monitoring period was approximately 15 minutes and 30 seconds.

Beyer testified:

1. Drove into the right lane and then merged into the left lane of travel.

Mr. Stroschein's final comments and arguments:

1. Exhibit 4 notes Idaho Department of Law Enforcement (IDLE). 206  
AGENCY RECORD

2. There has not been an IDLE for more than ten years.
3. In 2008, the Lifeloc FC20 was approved in Idaho as a breath-testing instrument.
4. ISP not IDLE approved the Lifeloc FC20's methods and standards.
5. Idaho Code §18-8004(4) requires a laboratory for evidentiary testing.
6. ISP Forensic Services failed to comply with this statutory requirement.
7. This proceeding should be vacated pursuant to Idaho Code §18-8002A(7)(d), since Trooper Talbott did not state he followed ISP standards.
8. Pursuant to case law, a monitoring period cannot occur while the driver is in the back seat of a patrol vehicle especially when the police officer is distracted on other things.
9. The Lifeloc FC20 training requires a time when the fifteen-minute monitoring period started.
10. Based upon the times noted in the record, impossible for a fifteen-minute monitoring period to occur.

### FINDINGS OF FACT

I, having heard the testimony; having heard the issues raised by the driver; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact:

**PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER HAS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ALL ISSUES RAISED BY THE PETITIONER.**

207

AGENCY RECORD



**1.****DID TROOPER TALBOTT HAVE LEGAL CAUSE TO STOP THE VEHICLE  
BEYER WAS DRIVING?**

1. Trooper Talbott observed the vehicle driven by Beyer fail to turn into the correct lane of travel as required by Idaho Code §49-644.
2. Although the traffic violation is not shown in Exhibit B, Exhibit B demonstrates Trooper Talbott had explained to Beyer how he illegally made the turn.
3. Pursuant to Idaho Code §18-8002A(7) Beyer bears the burden of proof by the preponderance of the evidence.
4. Beyer's testimony is given the same weight as given to Trooper Talbott's live testimony and sworn statement.
5. Because Beyer's testimony and Trooper Talbott's live testimony and sworn statement are equally contradictory, as required by Idaho Code, Beyer must provide evidence to support his position.
6. Beyer's testimony alone in this case does not outweigh Trooper Talbott's live testimony or sworn statement.
7. Beyer did not meet his burden of proof.
8. Trooper Talbott had legal cause to stop the vehicle driven by Beyer.

**2.****DID TROOPER TALBOTT HAVE LEGAL CAUSE TO BELIEVE BEYER  
VIOLATED IDAHO CODE §18-8004?**

1. Trooper Talbott observed Beyer driving a motor vehicle.
2. Beyer exhibited the following behaviors:
  - a. Smelled of an alcoholic beverage
  - b. Admitted to consuming alcoholic beverages
  - c. Glassy eyes
  - d. Bloodshot eyes
3. Beyer met or exceeded the minimum decision points on the horizontal gaze nystagmus and the 9-step walk and turn SFSTs.

4. Since Beyer failed **two** (plural) of the **three** SFSTs, Exhibit 4's narrative is correct and not ambiguous by stating Beyer *performed and failed the tests* (plural).
4. Exhibit L noted certain situations regarding the inadequacies of Trooper Talbott administering the SFSTs.
5. Even without considering the SFSTs, Trooper Talbott's observations of Beyer, as set forth in Exhibit 4's DUI NOTES are sufficient for requesting an evidentiary test from Beyer.
6. Idaho Code §18-8002A(5)(b)(v) provides the police officer's sworn statement shall state that *the person was lawfully arrested*.
7. Although Beyer was initially detained in order for him to submit to a breath test, Trooper Talbott's testimony at this ALS proceeding indicated how Beyer was lawfully arrested after Beyer refused the evidentiary breath test.
8. Trooper Talbott had sufficient legal cause to arrest Beyer and request an evidentiary test.

### 3.

#### **DID THE EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §§18-8004, 18-8004C, OR 18-8006?**

1. The analyses of Beyer's breath samples indicated a BrAC<sup>™</sup> of insufficient/.165/.158.
2. Based upon statements Trooper Talbott made to Beyer regarding needles used for blood testing, Exhibit L provides Beyer was threatened to take a breath test.
3. Beyer did not provide any testimony to support Exhibit L's speculation.
4. Pursuant to Idaho Code §18-8002A(7) Beyer believing he was threatened to take a breath test is not one of the exclusive issues that can be raised in an ALS hearing.
5. Since the record demonstrates Beyer submitted to and failed a breath test, Beyer was in violation of Idaho Code §18-8004.

AGENCY RECORD

209

173

**4.****WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE AND ISP FORENSIC SERVICES SOPs?**

1. Trooper Talbott's affidavit states the evidentiary test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.
2. The standard language in Trooper Talbott's sworn statement (Exhibit 4) does state Department of Law Enforcement (DLE) and not Idaho State Police (ISP).
3. As of July 1, 2000, DLE's name was changed to Idaho State Police.
4. With DLE and ISP being the same, the record is accurate and in compliance with statute in setting forth the proper authority.
5. Since DLE and ISP are one of the same, the Hearing Examiner can infer that Exhibit 3's boilerplate language refers to ISP just as it did to DLE prior to July 1, 2000.
6. It can also be inferred that since DLE is now ISP, the Lifeloc FC20 is an acceptable and approved breath-testing instrument within the state of Idaho and was properly used to test Beyer's breath sample.
7. ISP Forensic Services SOP § 6 requires a driver to be monitored for fifteen minutes prior to an evidentiary breath test.
8. Beyer argued he was not properly monitored based upon the times in the record and the area where Trooper Talbott was located during the monitoring period.
9. Based upon the times noted in Exhibit B, Beyer was monitored for at least fifteen minutes prior to his breath test (see Exhibit B from 02:43:29 to Beyer's first attempt at blowing into the Lifeloc FC20 at 02:59:01).
10. Unlike what is stated in Exhibit L, Exhibit B shows Beyer was warned not to burp, vomit, or regurgitate.
11. Pursuant to ISP Forensic Services SOP § 6, a police officer is not required to state this warning to a driver prior to the monitoring

period.

12. After the warning and prior to Beyer's breath test, Exhibit B does not set forth Beyer did anything or admitting to do anything that would have skewed his breath test results during the monitoring period.
13. After the start of the monitoring period and while Trooper Talbott was outside and next to Beyer, Exhibit B demonstrates Trooper Talbott continuously communicated with Beyer.
14. State vs. Remsburg (126 Idaho 340) states that during the observation period, the operator of a breath testing instrument does not need to stare continuously at the driver for the full fifteen minute monitoring period.
15. Remsburg further provides that the level of surveillance by the police officer of the driver during the observation must in the police officer's mind accomplish the requirements set forth in ISP Forensic Services SOP Section 6.
16. Trooper Talbott's testimony lacks any statement that he was unable to monitor Beyer as required by ISP Forensic Services SOP § 6.
17. Even when Trooper Talbott's attention was diverted to other situations during the monitoring period (including Trooper Talbott yelling to a tow truck driver for less than 8 seconds) Exhibit B and additionally Beyer failed to provide any proof that Trooper Talbott's other senses than sight were unable to assist in monitoring Beyer.
18. Added assumptions were made in Exhibit L regarding outside influences affecting Beyer's monitoring period.
19. However, Beyer did not offer testimony at this ALS hearing to support what is noted in Exhibit L nor has he submitted any proof by the preponderance of the evidence to back these assumptions.
20. Upon review of the Lifeloc FC20's manual and ISP Forensic Services SOPs, there is no mandate for the operator of a breath-testing instrument to indicate a time when the monitoring period commences on the duplicate printout from a breath-testing instrument.

AGENCY RECORD

211

175

21. Beyer's evidentiary test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.

**5.**

**DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY  
WHEN THE TEST WAS ADMINISTERED?**

1. The evidentiary breath-testing instrument used to test Beyer's breath sample completed a valid performance verification check at 04:20 hours on November 06, 2010.
2. The valid performance verification check approved the instrument for evidentiary testing in accordance with ISP Forensic Services SOP.
3. The evidentiary testing instrument functioned properly when the test was administered.

**6.**

**WAS BEYER ADVISED OF THE POSSIBLE SUSPENSION OF HIS IDAHO  
DRIVING PRIVILEGES?**

1. Beyer was played the Idaho Code §§18-8002 and 18-8002A advisory recording prior to submitting to the evidentiary test.
2. Beyer was advised of the consequences of refusing or failing evidentiary testing pursuant to Idaho Code §§18-8002 and 18-8002A.

**7.**

**ADDITIONAL ISSUES**

22. Exhibit I's issues of another state's "confidence interval" of breath testing instruments as provided in Exhibit K is for ISP Forensic Services to consider and address.
23. Issues noted in Exhibit K are not issues that can be raised in this ALS proceeding pursuant to Idaho Code §18-8002A(7).
24. ISP Forensic Services changing standards for breath testing instruments is a policy of another agency and the reasons for the

AGENCY RECORD

changes are unknown by me.

25. Arguments noted in Exhibit C regarding the ISP Forensic Services changes to the SOPs have been read but will not be ruled upon since such arguments cannot be address or considered in this ALS hearing pursuant to Idaho Code §18-8002A(7).

### **CONCLUSION OF LAW**

**CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT, I CONCLUDE THAT ALL OF THE REQUIREMENTS FOR SUSPENSION OF THE PETITIONER'S DRIVING PRIVILEGES SET FORTH IN IDAHO CODE §§18-8002 AND 18-8002A WERE COMPLIED WITH IN THIS CASE.**

**THE FOLLOWING ORDER IS RENDERED:**

### **ORDER**

**THE STAY ORDER IS HEREBY QUASHED AND THE SUSPENSION SET FORTH IN THE NOTICE OF SUSPENSION FOR FAILURE OF EVIDENTIARY TESTING SERVED BY TROOPER TALBOTT ON NOVEMBER 06, 2010, SHALL BE REINSTATED FOR 90 DAYS COMMENCING ON DECEMBER 29, 2010, AND REMAIN IN EFFECT THROUGH MARCH 29, 2011.**

DATED this 23<sup>rd</sup> day of December 2010

A handwritten signature in black ink, appearing to read "Eric G. Moody". The signature is fluid and cursive, with the first name "Eric" and last name "Moody" clearly distinguishable.

Eric G. Moody

ADMINISTRATIVE HEARING EXAMINER

## **FINAL ORDER**

(Hearings pursuant to section 18-8002A, I.C.)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one (21) days of its receipt, the motion will be deemed denied.

Alternatively, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

1. A hearing was held;
2. The final agency actions were taken; or
3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

215



## Endnotes

\*Idaho's Implied Consent Statute

<sup>†</sup>Idaho Transportation Department's (ITD hereafter) exhibits are numeric, Petitioner's exhibits are alpha

<sup>‡</sup>Idaho Transportation Department

<sup>§</sup>Idaho's Administrative Procedure Act

<sup>\*\*</sup>Idaho State Police

<sup>††</sup>Hereafter SOPs

<sup>††</sup>National Highway Transportation Safety Administration

<sup>§§</sup>Standardized field sobriety tests

<sup>\*\*\*</sup>Argument and testimony is summarized from record of hearing

<sup>†††</sup>Breath Alcohol Concentration

216

AGENCY RECORD

CHARLES M. STROSCHEIN  
 CLARK and FEENEY  
 Attorneys for Petitioner  
 1229 Main Street  
 P. O. Drawer 285  
 Lewiston, Idaho 83501  
 Telephone: (208)743-9516  
 Idaho State Bar No. 3058

**COPY**

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of the  
 Driving Privileges of:

GEORGE JAY BEYER, JR.,  
 Petitioner,

)  
 ) IDT File No. 648000035832

)  
 ) Idaho D. L. No. JA363481B

)  
 ) **EXPARTE MOTION FOR STAY**  
 ) **ON PENDING JUDICIAL**  
 ) **REVIEW**  
 )

COMES NOW, GEORGE JAY BEYER, JR, the Petitioner in the above-entitled  
 matter by and through his undersigned Attorney of Record, CHARLES M. STROSCHEIN,  
 of the firm of Clark & Feeney, and pursuant to Idaho Code Section 67-5274 hereby  
 respectfully moves this Court for entry of an Order staying the execution and/or enforcement  
 of the Findings of Fact and Conclusions of Law and Order previously entered in this matter  
 on or about December 23, 2010, which sustains the suspension of the Petitioner's driver's  
 license or privileges allegedly for failure of evidentiary testing for alcohol concentration  
 pursuant to Idaho Code Section 18-8002A. Relief is requested upon grounds which include,  
 but are not limited to, the following:

AGENCY RECORD

EXPARTE MOTION FOR STAY ON

LAW OFFICES OF  
 CLARK AND FEENEY, LLP  
 LEWISTON, IDAHO 83501

217

181

1. Petitioner has filed a timely Petition for Judicial Review from the Findings of Fact and Conclusions of Law and Order;

2. A stay of the Findings of Fact and Conclusions of Law and Order and suspension of Mr. Beyer's driver's license or privileges is necessary to preserve his driving privileges during the pendency of a judicial review. Without such relief, Mr. Beyer will be necessarily denied, as a practical matter, the relief which he is seeking by way of his petition for judicial review; and

3. The Petitioner has several viable defenses to the license suspension, as were presented to the hearing officer in this matter. Those defenses include but are not limited to the following:

A. Whether or not the arresting trooper, the operator of the breath test machine, failed to comply with the requirements for a breath test; and

B. Whether or not the arresting trooper had failed to comply with Idaho Code § 18-8002(A).

C. Whether the hearing officer failed to comply with obvious case precedent regarding the trooper's diverted attention outside interferences since he was outside his vehicle. Instead of monitoring Mr. Beyer, the trooper started yelling at a tow truck driver.

D. Whether the hearing officer failed to acknowledge the fact that the Trooper's testimony was found not to be creditable. The hearing officer failed to note the lack of credibility in the trooper's testimony. The hearing officer's decision is also contrary

to the record and should require this Court find that Mr. Beyer's testimony is more credible  
then the trooper's testimony which was found to be faulty.

4. A stay is necessary in the interests of justice.

5. The Petitioner asks for an expedited hearing to protect his due process rights  
regarding his ability to drive and suspension that will take effect on December 29, 2010.

DATED this 27<sup>th</sup> day of December, 2010.

CLARK and FEENEY

**s/Charles M. Stroschein**

By \_\_\_\_\_

Charles M. Stroschein, a member of the firm.

Attorneys for Respondent.

I hereby certify on the 27<sup>th</sup>  
day of December 2010, a true copy  
of the foregoing instrument

was: ☒ Mailed  
☒ Faxed  
☐ Hand delivered  
☐ Overnight mail to:

Idaho Transportation Department  
Driver Services Section  
P O Box 7129  
Boise ID 83707  
Facsimile: (208) 332-7810

Edwin L. Litteneker  
Attorney at Law  
PO Box 321  
322 Main St.  
Lewiston, ID 83501

CLARK and FEENEY

**s/Charles M. Stroschein**

By \_\_\_\_\_

Attorneys for Respondent

AGENCY RECORD

EXPARTE MOTION FOR STAY ON  
JUDICIAL REVIEW

LAW OFFICES OF  
**CLARK AND FEENEY, LLP**  
LEWISTON, IDAHO 83501

219

183

**COPY**

CHARLES M. STROSCHEIN  
CLARK and FEENEY  
Attorneys for Driver  
1229 Main Street  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208)743-9516  
Idaho State Bar No. 3058

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of the  
Driving Privileges of:

GEORGE JAY BEYER, JR.,  
Petitioner,

) Case No. \_\_\_\_\_

) IDT File No. 648000035832

) Idaho D. L. No. JA3633481B

) **EXPARTE ORDER FOR STAY**  
) **ON PENDING JUDICIAL**  
) **REVIEW**

The motion of the Petitioner for stay pending judicial review having come on duly and  
regularly before this court, and good cause appearing therefore;

NOW, THEREFORE, IT IS HEREBY ORDERED that the execution and/or  
enforcement of the Findings of Fact and Conclusions of Law and Order previously entered  
in this matter on December 23, 2010, suspending Petitioner's driver's license or privileges  
be, and the same is hereby stayed during the pendency of judicial review of said order.

EXPARTE ORDER FOR STAY ON  
PENDING JUDICIAL REVIEW

-1-

AGENCY RECORD

220

Petitioner's driving privileges are therefore ordered reinstated during the pendency of judicial review.

DATED this \_\_\_\_ day of December, 2010.

\_\_\_\_\_  
Judge

I hereby certify on the \_\_\_\_  
day of December, 2010, a true copy  
of the foregoing instrument  
was: \_\_\_\_ Mailed  
\_\_\_\_ Faxed  
\_\_\_\_ Hand delivered  
\_\_\_\_ Overnight mail to:

Idaho Transportation Department  
Driver Services Section  
P O Box 7129  
Boise ID 83707  
Facsimile: (208) 332-7810

Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
PO Box 321  
322 Main St.  
Lewiston, ID 83501

Charles M. Stroschein  
Clark and Feeney  
1229 Main Street  
P.O. Box 285  
Lewiston ID, 83501

CLERK OF THE COURT

By \_\_\_\_\_  
Deputy

EX PARTE ORDER FOR STAY ON  
PENDING JUDICIAL REVIEW

-2-

LAW OFFICES OF  
CLARK AND FEENEY, LLP  
LEWISTON, IDAHO 83501

221

185

**CLARK and FEENEY**

THE TRAIN STATION, SUITE 106  
1229 MAIN STREET  
P.O. DRAWER 285  
LEWISTON, IDAHO 83501

TELEPHONE: (208) 743-9516  
FAX: (208) 746-9160

---

**FAX COVER SHEET**

---

DATE: December 27, 2010  
FROM: CHARLES M. STROSCHEIN  
TO: IDAHO TRANSPORTATION DEPT  
FAX NO. (208) 332-2002  
RE: George J. Beyer

Please see attached.

TOTAL NO OF PAGES (INCLUDING THIS COVER PAGE): 23

For missing or illegible pages please telephone (208)743-9516, and speak to: CHARITY

The pages comprising this facsimile transmission contain confidential information from the office of Clark and Feeney. This information is intended solely for use by the individual entity named as the recipient hereof. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this transmission is prohibited. If you have received this transmission in error, please notify us by telephone immediately so we may arrange to retrieve this transmission at no cost to you.

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RON T. BLEWETT  
WILLIAM JEREMY CARR  
PAUL THOMAS CLARK  
JENNIFER B. DOUGLASS  
THOMAS W. FEENEY  
SCOTT D. GALLINA \*\*  
JONATHAN D. HALLY  
RUBE G. JONES \*\*  
TINA L. KERNAN \*\*  
JOHN C. MITCHELL  
DOUGLAS L. MUSHLITZ  
CHARLES M. STROSCHERIN \*\*  
CONNIE TAYLOR \*\*

\*\* LICENSED IN WASHINGTON & OREGON ONLY  
\*\* LICENSED IN IDAHO & WASHINGTON

LAW OFFICES OF  
**CLARK AND FEENEY, LLP**  
THE TRAIN STATION, SUITE 106  
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TELEPHONE  
(208) 743-9516  
(800) 965-9516  
FAX  
(208) 746-9180  
cflaw@lewiston.com

**COPY**

December 27, 2010

Clerk of the District Court  
Nez Perce County  
PO Box 896  
Lewiston, ID 83501

Attn: Criminal Dept.

RE: In the Matter of the Driving Privileges of George Jay Beyer, Jr.  
IDT File No. 64800035832

Dear Clerk:

Enclosed herewith for filing is the **original and one copy** of a *Petition for Judicial Review, Ex Parte Motion for Stay on Pending Judicial Review* and *Ex Parte Order for Stay on Pending Judicial Review*. Please present the Order to the Judge and if everything meets with his approval, please file the Order in your usual manner and remit the conformed copies to me, the Idaho Department of Transportation and Edward Litteneker in the enclosed envelopes. Please file the original Petition and Motion in your usual manner and remit conformed copies of the same to me in the enclosed envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,

CLARK and FEENEY  
s/Charles M. Stroschein

Charles M. Stroschein

CMS:cw

Enclosure

AGENCY: George Beyer (w/ enc)

Idaho Transportation Department (w/ enc)

Edward Litteneker (w/ enc)

223

187



FILED

2010 DEC 27 PM 3 56

PATTY O. WEEKS  
CLERK OF THE DIST. COURT

**DIANE ASH**  
DEPUTY

CHARLES M. STROSCHEIN  
CLARK and FEENEY  
Attorneys for Driver  
1229 Main Street  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208)743-9516  
Idaho State Bar No. 3058

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of the  
Driving Privileges of:

GEORGE JAY BEYER, JR.,

Petitioner.

Case No. **CV10-02748**

IDT File No. 648000035832

Idaho D. L. No. JA3633481B

**EXPARTE ORDER FOR STAY  
ON PENDING JUDICIAL  
REVIEW**

The motion of the Petitioner for stay pending judicial review having come on duly and  
regularly before this court, and good cause appearing therefore;

NOW, THEREFORE, IT IS HEREBY ORDERED that the execution and/or  
enforcement of the Findings of Fact and Conclusions of Law and Order previously entered  
in this matter on December 23, 2010, suspending Petitioner's driver's license or privileges  
be, and the same is hereby stayed during the pendency of judicial review of said order.

EXPARTE ORDER FOR STAY ON  
PENDING JUDICIAL REVIEW

-1-

AGENCY RECORD

**COPY**

224

LAW OFFICES OF  
CLARK AND FEENEY, LLP

Petitioner's driving privileges are therefore ordered reinstated during the pendency of judicial review.

DATED this 27<sup>th</sup> day of December, 2010.

JEFF M. BRUDIE  
Judge

I hereby certify on the 28<sup>th</sup>  
day of December, 2010, a true copy  
of the foregoing instrument  
was: ☒ Mailed  
☐ Faxed  
☐ Hand delivered  
☐ Overnight mail to:

Idaho Transportation Department  
Driver Services Section  
P O Box 7129  
Boise ID 83707  
Facsimile: (208) 332-7810

Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
PO Box 321  
322 Main St.  
Lewiston, ID 83501

Charles M. Stroschein  
Clark and Feeney  
1229 Main Street  
P.O. Box 285  
Lewiston ID, 83501

*Hand Delivered  
12/27/2010*

CLERK OF THE COURT

**DIANE ASH**

By \_\_\_\_\_  
Deputy

EX PARTE ORDER FOR STAY ON  
PENDING JUDICIAL REVIEW

-2-

LAW OFFICES OF  
CLARK AND FEENEY, LLP  
LEWISTON, IDAHO 83501

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189

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LAW OFFICES OF  
**CLARK AND FEENEY, LLP**  
P.O. DRAWER 285  
LEWISTON, IDAHO 83501

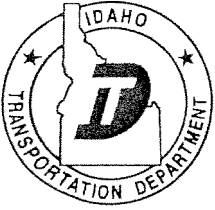
Idaho Transportation Department  
Driver Services Section  
P O Box 7129  
Boise ID 83707  
Facsimile: (208) 332-7810

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**RECEIVED**  
DEC 30 2010  
DRIVER SERVICES  
ID. TRANSPORTATION DEPT.

226 190



**IDAHO TRANSPORTATION DEPARTMENT**

Driver Services • P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov

Date: December 30, 2010

Wally Hedrick  
Hedrick Court Reporting  
PO Box 578  
Boise, Idaho 83701

Re: BEYER, GEORGE JACOB JR, A.L.S. File #648000035832  
Administrative License Suspension, Date of Hearing: December 1, 2010

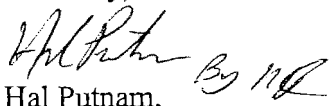
Dear Mr. Hedrick

Please find enclosed the recording of the administrative hearing as referenced above. The hearing is approximately 77 minutes long. Please prepare an estimate of the transcription cost, and submit the estimate to the State's assigned attorney. Please send a copy of the estimate to my attention as well. The attorney representing the State in this case is:

Edwin Litteneker  
Attorney At Law  
PO Box 321  
Lewiston, Id 83501  
208 746-0344

If the transcript cannot be completed within 14 days of the receipt of the estimated cost, please notify the State's attorney. Upon completion of the transcript send the original and two copies to the State's attorney for filing with the court along with the administrative record. The final billing, of course, should go to the State's attorney. If you have any questions, please contact me at (208) 334-4465.

Sincerely,

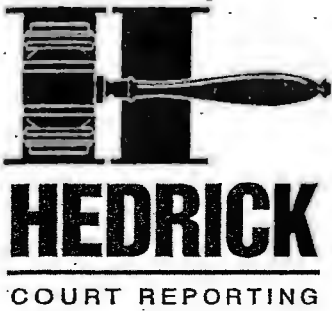
  
Hal Putnam,

Driver Records Program Supervisor  
Driver Services  
enc: cd recording for Hal Putnam

**COPY**

PC 227

**COPY**



January 7, 2011

EDWIN LITTENEKER, ESQ.  
Attorney at Law  
P.O. Box 321  
Lewiston, ID 83501

RE: George Jacob Beyer, JR., A.L.S. File #648000035832  
A.L.S., Date of Hearing: December 1, 2010

Dear Mr. Litteneker:

Per the request of the Supervisor of Driver Records, Hal Putnam, we are hereby providing you with an estimate of the transcription costs in the above entitled matter.

Cost of preparing an original plus two copies from the cassette tape provided by the state, with an estimated length of 77 minutes is:

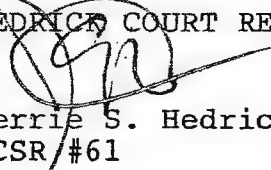
\$585.00

Delivery time is 10 working days from the date that we receive written authority to proceed from Petitioner's legal counsel. Petitioner's payment must be received prior to delivery of the transcript.

Thank you.

Sincerely,

HEDRICK COURT REPORTING

  
Jerrie S. Hedrick  
ICSR #61

cc: Hal Putnam

*Serving the legal community since 1978*

POST OFFICE BOX 578  
BOISE, IDAHO 83701  
208-336-9208

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228

192